

QUALLS & WORKMAN, L.L.P.
Daniel H. Qualls (Bar # 109036)
Robin G. Workman (Bar # 145810)
244 California Street, Suite 410
San Francisco, CA 94111
Telephone: (415) 782-3660

Attorney for Plaintiff Johnny McFarland,
and all others similarly situated.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHNNY MCFARLAND, on behalf of himself and all others similarly situated,)	CASE NO. CV 07-03953 PJH
Plaintiff,)	APPENDIX OF DECISIONS IN SUPPORT OF
vs.)	PLAINTIFF'S MOTION FOR PARTIAL
)	SUMMARY JUDGMENT
GUARDSMARK, LLC, and Does 1 through 50, inclusive,)	Date: 2/13/08
)	Time: 9:00 a.m.
)	Ctrm: 3, 17 th Floor
Defendants.)	Judge: Hon. Phyllis J. Hamilton

Plaintiff submits the following authorities and decisions in support of his Motion for
Summary Judgment for the Court's reference:

- A. Brookler v. RadioShack Corp., No. BC313383 (Los Angeles County Superior Court, filed Feb. 8, 2006)
- B. Gonzalez v. Nestle Waters North America Holdings, No. BC321485 (Los Angeles County Superior Court, filed Feb. 8, 2006)
- C. Miguel, et al. v. Inland Paperboard And Packaging, Inc., 2007 U.S. App. LEXIS 1515 (9th Cir. Oct. 20, 2006)
- D. Perez v. Safety-Kleen Systems, Inc., 2007 U.S. Dist. LEXIS 48308 (N.D. Cal. Jun. 27, 2007)
- E. Savaglio v. Wal-Mart Stores, Inc., no. C-835687 (Alameda County Superior Court, filed Nov. 6, 2003)

- 1 F. Smith v. Hearst Communications, Inc., 2006 U.S. Dist. LEXIS 22546 (N.D.
2 Cal. April 13, 2006)
- 3 G. Stevens v. GCS Service, Inc., No. 04-1337CJC (C.D. Cal., filed Apr. 6,
4 2006)
- 5 H. Tormey v. The Vons Cos., et al, 2007 U.S. Dist. LEXIS 66010 (S.D. Cal.
6 Sept. 5, 2007)
- 7 I. Torres v. ABC Security Service, Inc., No. RG04-158744 (Alameda County
8 Superior Court, filed Dec. 12, 2006)

9
10 Date: January 9, 2008

QUALLS & WORKMAN, L.L.P.

11 By: /S/ Robin G. Workman
12 Attorneys for Plaintiff Johnny McFarland,
13 and all others similarly situated.
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PROOF OF SERVICE

I, the undersigned, hereby declare:

I am a member of the bar of this court. I am over the age of eighteen years and not a party to the within action. My business address is Qualls & Workman, L.L.P., 244 California Street, Suite 410, San Francisco, California.

October 25, 2007, I served a true and correct copy of the **APPENDIX OF DECISIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** electronically. I caused said documents to be transmitted using ECF as specified by General Order No. 45 to the following parties:

Martin D. Bern
Munger Tolles & Olson LLP
560 Mission Street
Twentyseventh Floor
San Francisco, CA 94105-2907
bernmd@mto.com

Malcolm A. Heinicke
Munger Tolles & Olson LLP
560 Mission Street
27th Floor
San Francisco, CA 94105-2907
heinickema@mto.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 9, 2008, at San Francisco, California.

/S/ Robin G. Workman

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
10

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am BC313383

Plaintiff
Counsel

MORRY BROOKLER

VS

Defendant
Counsel

RADIO SHACK CORPORATION

NATURE OF PROCEEDINGS:

MOTION BY PLAINTIFF FOR CLASS CERTIFICATION (TAKEN UNDER SUBMISSION ON 1-31-2006);

After further consideration of the pleadings, the evidence, the relevant authority and the oral argument of counsel, the court rules as follows on Plaintiff's Motion for Class Certification:

■ THE FACTS

This is a purported class action filed Morry Brookler ("Plaintiff") filed an action against his former employer, RadioShack Corporation ("Defendant") alleging that Defendant denied him and others similarly situated employees their requisite meal and break rests in violation of the California Labor Code.

The two proposed Classes that Plaintiff is seeking certification of are defined as follows:

Class I: All non-exempt employees in Radio Shack stores in California from April 7, 2000, through the present who were not allowed to take a 10 minute rest period during every 4 continuous hours of employment.

Class II: All non-exempt employees at Radio Shack stores in California from April 7, 2000, through the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE L. MARKMILLER

DEPUTY CLERK

HONORABLE
10A

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff NONE

Reporter

8:30 am

BC313383

Plaintiff
CounselMORRY BROOKLER
VS
RADIOSHACK CORPORATIONDefendant
Counsel

NATURE OF PROCEEDINGS:

present who were not provided uninterrupted 30 minute meal break following every 5 continuous hours of work.

■ ANALYSIS

Class certification is appropriate when "the question is one of a common or general interest, of many persons, or when parties are numerous and it is impracticable to bring them all before the court." Code of Civil Procedure § 382. "To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among class members.

[Citation] The community of interest requirement involves three factors: '[1] predominant questions of law or fact; [2] class representatives with claims or defenses typical of the class; and [3] class representatives who can adequately represent the class. The party seeking certification has the burden of establishing the prerequisites for a class action." Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326, citing Lockheed Martin Corporation v. Superior Court (2003) 29 Cal.4th 1096, 1104.

For the reasons that follow, after considering all of the relevant factors, the court finds that the Plaintiffs have not met that burden with regard to Class I, but Plaintiffs have met this burden for

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
10.8

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC313383

Plaintiff

Counsel

MORRY BROOKLER

VS

Defendant

RADIO SHACK CORPORATION

Counsel

NATURE OF PROCEEDINGS:

Class II.

Ascertainability:

Ascertainability is required in order to give notice to putative class members who may be affected by the judgment. It is defined in terms of "objective characteristics and common transactional facts making the ultimate identification of class members possible. Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 915. Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. Reyes v. Board of Supervisors of San Diego County (1987) 196 Cal.App.3d 1263, 1271.

Plaintiff defined two classes of employees that he believed qualified for damages under the instant facts. The definitions, in summary, stated that class members were non-exempt employees of radio shack during a specific time period that were denied either a meal period or a rest break. It can be inferred that Defendant is opposing this element because the definitions include ultimate facts, namely, people who were denied. According to the California Appellate Court, "A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law, i.e., homeowners whose homes contain Fibermesh

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

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HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
10C

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC313383

Plaintiff

Counsel

MORRY BROOKLER

VS

Defendant

RADIOSHACK CORPORATION

Counsel

NATURE OF PROCEEDINGS:

Foundations "with manifested damage or defect due to the Fibermesh substitution " Hicks v. Kaufman and Broad Home Corp. (2001) 89 Cal.App.4th 908, 915.

As such, the definition is valid and the putative class may be ascertained from Defendant's personnel records.

Common questions of law or fact:

In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged. Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 916. The Court must consider whether the theory of recovery advanced by the proponents of certification, is, as an analytical matter, likely to prove amenable to class treatment. Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 327.

Pursuant to the California Appellate Court's holding in Albert H. Cicairos et al. v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949, 963, "Under the facts presented in support of summary judgment, the defendant's obligation to provide the plaintiffs with an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have an affirmative obligation to ensure that workers are actually

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
10D

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am BC313383

Plaintiff
Counsel

MORRY BROOKLER

VS

Defendant
Counsel

RADIOSHACK CORPORATION

NATURE OF PROCEEDINGS:

relieved of all duty." Thus, pursuant to current law, the lack of evidence that meal breaks were given to the putative class members corroborates Plaintiff's theory that common proof, namely Defendant's records, can be used to prove liability. This conclusion was not refuted by Defendant's contention that meal breaks were offered per employee manuals since offering meal breaks in an employee manual does not satisfy the burden of ensuring that employees receive a meal break. On the other hand, it is difficult to track any wrongdoing on the part of the Defendant with regard to rest breaks since the written employee manual requires rest breaks and employers are not mandated to keep written records of an employee's rest break.

Class representatives with claims or defenses
Typical of the Class:

The class representative's claim are typical of class claims if the individual facts applicable to the class representative are very similar, but not necessarily identical, to the facts which are common to the class. Classen v. Weller (1983) 145 Cal.App.3d 27, 46.

Plaintiff's evidence establishes similar claims between both Plaintiff and the putative class.

Class representatives are Adequate to represent the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARKMILLER

DEPUTY CLERK

HONORABLE
10 E

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC313383

Plaintiff

Counsel

MORRY BROOKLER

VS

Defendant

RADIOSHACK CORPORATION

Counsel

NATURE OF PROCEEDINGS:

Class:

To maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class. Simons v. Horowitz (1984) 151 Cal.App.3d 834, 846.

There are two criteria that a Class Representative has to meet in order to be deemed adequate: (1) that they are zealous fiduciaries; and (2) that there are no existing antagonisms or conflicts with the class members. City of San Jose v. Superior Court (Lands Unlimited) 1974 12 Cal.3d 447, 464.

The court finds that Plaintiff is a zealous fiduciary that has pursued all of the viable claims on behalf of other similarly situated employees of Radio Shack. There is no evidence of Plaintiff having any interests that are antagonistic to the putative class members'.

Superiority:

The superiority criterion is manifest in the determination that a class action brought under CCP §382 would produce substantial benefits to the litigants and the judicial system. Schneider v. Vennard (1986) 183 Cal.App.3d 1340, 1347.

The court has considered both the benefits that a class action would yield, as well as the potential

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
10 F

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC313383

Plaintiff

Counsel

MORRY BROOKLER

VS

Defendant

RADIOSHACK CORPORATION

Counsel

NATURE OF PROCEEDINGS:

unfairness to the Defendant, which might result from a litigation of the underlying claims through aggregate procedures rather than through separate trials. As discussed above, the court finds that the Plaintiff did not meet his burden of proof with regard to Class I. Nonetheless, with regard to Class II, Plaintiff has established that he may use common evidence to prove facts and resolve legal issues which apply to every Class Member's claim since common issues would be the principal issues in any individual action.

Judicial Notice:

The Court grants Defendant's request for judicial notice of the administrative materials contained in Exhibits A-B. The Court denies judicial notice of the Memorandum dated December 20, 2004, and the June 16, 2005, Minute Order attached as Exhibits C and D.

OTHER ORDERS

A case management conference is set for hearing on 4-5-2006 at 8:30 a.m. in Department 69.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARKMILLER

DEPUTY CLERK

HONORABLE
10 G

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC313383

Plaintiff
Counsel

MORRY BROOKLER

VS

Defendant
Counsel

RADIOSHACK CORPORATION

NATURE OF PROCEEDINGS:

a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 2-8-2006 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 2-8-2006

John A. Clarke, Executive Officer/Clerk

By:

L. Markmiller
L. MARKMILLER

Scott A. Brooks
DANIELS, FINE ISRAEL & SCHONBUCH, LLP
1801 Century Park East, 9th Floor
Los Angeles, CA 90067

Stephen Glick
LAW OFFICES OF STEPHEN GLICK
3580 Wilshire Blvd., Suite 1260
Los Angeles, CA 90010

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARKMILLER

DEPUTY CLERK

HONORABLE
10 H

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC313383

Plaintiff

Counsel

MORRY BROOKLER

VS

Defendant

RADIOSHACK CORPORATION

Counsel

NATURE OF PROCEEDINGS:

Ian Herzog
LAW OFFICES OF IAN HERZOG
233 Wilshire Blvd., Suite 550
Santa Monica, CA 90405

Robert S. Brewer, Jr.
Randy S. Grossman
McKENNA LONG & ALDRIDGE LLP
750 B Street, Suite 3300
San Diego, CA 92101

EXHIBIT B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE L. MARKMILLER

DEPUTY CLERK

HONORABLE
9

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A

Deputy Sheriff

NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

MOTION OF PLAINTIFFS JESUS GONZALEZ AND ROBERT STAFFORD FOR CLASS CERTIFICATION (TAKEN UNDER SUBMISSION ON 12-16-2005);

After further consideration of the pleadings, the evidence, the relevant authority and the oral argument of counsel, the court rules as follows on Plaintiff's Motion for Class Certification:

■ THE FACTS

This is a purported class action filed by Jesus Gonzalez and Robert Stafford ("Plaintiffs") against their employer, Nestle Waters North America Holdings, Inc. dba Arrowhead Mountain Spring Water ("Defendant") alleging that Defendant's compensation plan resulted in missed meal periods and rest periods and a variety of unpaid wages for the persons employed as Route Sales Representatives ("RSR").

The four proposed Classes in the instant action are defined as:

Class I (Overtime Class): All California based hourly RSR employees who worked overtime for defendant from September 14, 2000 through to the present and received any revenue share component in his/her compensation.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
9A

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

Class II (Rest Period Class): All California based hourly non-exempt RSRs who were or are employed by defendants from September 14, 2000 to present who were subject to defendant's rest period policy.

Class III (Meal Period Class): All California based hourly non-exempt RSRs who were or are employed by defendants from September 14, 2000 to the present who were subject to defendant's meal period policy.

Class IV (Waiting Time Penalty Class): All California based hourly non-exempt RSRs employed in California any time from September 14, 2000 to the present who left employment with the defendant and did not receive all wages due as a result of revenue sharing, meal and break violations on termination.

■ ANALYSIS

Class certification is appropriate when "the question is one of a common or general interest, of many persons, or when parties are numerous and it is impracticable to bring them all before the court." Code of Civil Procedure § 382. "To obtain certification, a party must establish the existence of both an ascertainable class and a well-defined community of interest among class members.

[Citation] The community of interest requirement

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE L. MARKMILLER

DEPUTY CLERK

HONORABLE
98

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff NONE

Reporter

8:30 am BC321485

Plaintiff
Counsel

JESUS GONZALEZ

VS

Defendant
CounselNESTLE WATERS NORTH AMERICA
HOLDINGS

NATURE OF PROCEEDINGS:

involves three factors: '[1] predominant questions of law or fact; [2] class representatives with claims or defenses typical of the class; and [3] class representatives who can adequately represent the class. The party seeking certification has the burden of establishing the prerequisites for a class action." Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326, citing Lockheed Martin Corporation v. Superior Court (2003) 29 Cal.4th 1096, 1104.

For the reasons that follow, after considering all of the relevant factors, the court finds that the Plaintiffs have not met that burden with regard to Class I; but Plaintiffs have met this burden for Classes II-IV.

Ascertainability:

Ascertainability is required in order to give notice to putative class members who may be affected by the judgment. It is defined in terms of "objective characteristics and common transactional facts making the ultimate identification of class members possible. Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 915. Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members. Reyes v. Board of Supervisors of San Diego County (1987) 196

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE L. MARKMILLER

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

9C

A. AYALA, C.A

Deputy Sheriff NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

Cal.App.3d 1263, 1271.

In a wage and hour action the class is typically ascertainable as the employer is forced to maintain an employee's personnel file for a specific period of time. Both parties agree that the class member's number more than 1000 thus numerosity is met and joinder is impracticable.

Common questions of law or fact:

In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged. Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 916. The Court must consider whether the theory of recovery advanced by the proponents of certification, is, as an analytical matter, likely to prove amenable to class treatment. Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 327.

The court finds the following issues common to the class as a whole and sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court (Vasquez v. The Superior Court of San Joaquin County (Karp) (1971) 4 Cal. 3d 800, 811) (1) Whether the policy to deduct 30 minutes off of every employee's wages for lunch is valid; and (2) Whether the employees

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
9D

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

are due wages for failure to compensate for the missing meal/rest periods. Both parties proffered deposition testimony wherein the deponent discussed the existence of the thirty minute deductions from the wages of employees for meal periods without any regard for whether or not the employee actually received his/her break.

The Plaintiffs did not provide the Court with sufficient evidence to support their theory that common evidence could be utilized to determine liability for Defendant's revenue sharing/overtime policy. As a result, the court finds that the inquiry into whether each Plaintiff was entitled to overtime does not prove to be amenable to class treatment. Sav-On Drug Stores, Inc. supra 34 Cal.4th at page 327.

Class representatives with claims or defenses
Typical of the Class:

The class representative's claim are typical of class claims if the individual facts applicable to the class representative are very similar, but not necessarily identical, to the facts which are common to the class. Classen v. Weller (1983) 145 Cal. App. 3d 27, 46.

Nestle argues that Plaintiffs were RSRs but they were not assigned to a typical route, thus, they had ample time to take breaks or to choose to

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARK MILLER

DEPUTY CLERK

HONORABLE
9 E

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

forego their break. Plaintiffs argue that that they are typical because the same alleged unlawful conduct was directed at all of the RSRs employed by Nestle. The California appellate court has decided that employers have an affirmative obligation to ensure that workers are actually relieved of all duty. They also have a duty, under Cal. Code Regs., tit. 8, § 11090, known as Wage Order No. 9, to record their employees' meal periods. Albert H. Cicairos et al. v. Summit Logistics, Inc. (2005) 133 Cal. App. 4th 949, 963. Since Plaintiffs' route is not a factor in violation of the Labor Code and/or IWC Order No.9 Plaintiffs' claims are similar to the claims of the putative class members.

Class representatives are Adequate to represent the Class:

To maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class. Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 846.

There are two criteria that a Class Representative has to meet in order to be deemed adequate: (1) that they are zealous fiduciaries; and (2) that there are no existing antagonisms or conflicts with the class members. City of San Jose v. Superior Court (Lands Unlimited) 1974 12 Cal.3d 447, 464.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

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L. MARK MILLER

DEPUTY CLERK

HONORABLE
9 F

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

The court finds that Plaintiffs could vigorously represent the absent class member as Plaintiffs pursued all of the viable claims on behalf of other employees that were similarly situated and Plaintiffs do not have any interests that are antagonistic to the putative class members'.

Superiority:

The superiority criterion is manifest in the determination that a class action brought under CCP §382 would produce substantial benefits to the litigants and the judicial system. Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1347.

Plaintiffs' cite the Court's ruling in Cicairos supra (2005) 133 Cal. App. 4th 949, to support their position that class adjudication is superior based upon the instant facts. Since Cicairos held that an employer has an affirmative obligation to ensure that workers receive their meal and rest breaks, Plaintiffs aver that it would be beneficial to the Court and the litigants to utilize common proof to find liability for all of Nestle's employees that were affected by their actions.

The court has considered both the benefits that a class action would yield, as well as the potential unfairness to the Defendant, which might result from a litigation of the underlying claims through aggregate procedures rather than through separate

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

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HONORABLE EDWARD A. FERNS

JUDGE

L. MARKMILLER

DEPUTY CLERK

HONORABLE
9 G

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A.

Deputy Sheriff

NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

trials. As discussed above, the court finds that the Plaintiffs did not meet their burden with regard to Class I. On the contrary, with regard to Classes II-IV, Plaintiffs have established that they can use common proof to prove facts and resolve legal issues which apply to every Class Members' claims as common issues would be the principal issues in any individual action.

Judicial Notice:

The Court grants Plaintiffs two requests for judicial notice pursuant to Evidence Code §§ 452 and 453 with the understanding that Judicial notice may be taken of: Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States; and Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. In addition, the court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." Day v. Sharp (1975) 50 Cal.App.3d 904, 914.

OTHER ORDERS

A case management conference is set for hearing on 4-5-2006 at 8:30 a.m. in Department 69.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE

L. MARKMILLER

DEPUTY CLERK

HONORABLE
9H

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A

Deputy Sheriff

NONE

Reporter

8:30 am

BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 2-8-2006 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 2-8-2006

John A. Clarke, Executive Officer/Clerk

By: _____


L. MARKMILLER

Joseph Antonelli
Janelle Carney
LAW OFFICE OF JOSEPH ANTONELLI
1000 Lakes Drive, Suite 450
West Covina, CA 91790

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/08/06

DEPT. 69

HONORABLE EDWARD A. FERNS

JUDGE L. MARKMILLER

DEPUTY CLERK

HONORABLE
9I

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

A. AYALA, C.A

Deputy Sheriff NONE

Reporter

8:30 am BC321485

Plaintiff

Counsel

JESUS GONZALEZ

VS

Defendant

NESTLE WATERS NORTH AMERICA
HOLDINGS

Counsel

NATURE OF PROCEEDINGS:

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EXHIBIT C

LEXSEE 2007 US APP LEXIS 1515

**MARK MIGUEL; JOHN MUNOZ; JESUS REGALDO, Plaintiffs - Appellants, v.
INLAND PAPERBOARD AND PACKAGING, INC., Defendant - Appellee.**

No. 05-16324

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2007 U.S. App. LEXIS 1515; 153 Lab. Cas. (CCH) P10,788

**October 20, 2006, Argued and Submitted, San Francisco, California
January 18, 2007, Filed**

NOTICE: [*1] PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-04-05324-MJJ. Martin J. Jenkins, District Judge, Presiding.

COUNSEL: For MARK MIGUEL, JOHN MUNOZ, JESUS REGALDO, Plaintiff - Appellant: W. David Holsberry, Esq., Michael T. Anderson, Esq., Michael C. Hughes, Esq., DAVIS, COWELL & BOWE LLP, San Francisco, CA.

For INLAND PAPERBOARD AND PACKAGING, INC., Defendant - Appellee: James L. Payne, Esq., Jeffrey K. Brown, Esq., James R. Moss, Jr., PAYNE & FEARS, LLP, Irvine, CA.

JUDGES: Before: KLEINFELD and BYBEE, Circuit Judges, and WHALEY **, US District Judge.

** The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[*2] Before: KLEINFELD and BYBEE, Circuit Judges, and WHALEY**, US District Judge.

Mark Miguel, *et al*, are former employees of Inland Paperboard and Packaging, Inc. and members of the Association of Western Pulp and Paper Workers, Local 249. A collective bargaining agreement between Inland Paperboard and Local 249 governed their terms of employment.

Miguel claims Inland Paperboard violated California Labor Code § 512 and IWC Wage Order 1-2001 by failing to provide a 30-minute off-duty meal period. Under California Labor Code § 512(a), employers must provide a half-hour meal period to certain employees working shifts of five hours or longer. Under IWC Wage Order 1-2001, a § 512 meal period must be off-duty unless "the nature of the work prevents an employee from being relieved of all duty" and "by written agreement between the parties an on-the-job paid meal period is agreed to." ¹

1 IWC Wage Order 1-2001 § 11.

Miguel filed an action in California Superior [*3] Court, claiming *inter alia* Inland Paperboard failed to provide off-duty meal periods. Inland Paperboard removed the action to the United States District Court under § 301 of the Labor Management Relations Act, based on the collective bargaining agreement. ² Miguel moved to remand, arguing his meal period claim was based entirely on California law. Inland Paperboard opposed the motion to remand and filed a motion for summary judgment based on complete preemption under § 301. The district court denied Miguel's motion for remand and granted Inland Paperboard's motion for summary judgment, finding § 301 preempts Miguel's claim because it requires interpretation of the collective bargaining agreement. Miguel appealed the district court's rulings on preemption and jurisdiction.

2 29 U.S.C. § 185.

2007 U.S. App. LEXIS 1515, *; 153 Lab. Cas. (CCH) P10,788

This court reviews *de novo* the district court's finding of § 301 federal preemption.³ Under the complete preemption exception to the well-pleaded complaint rule, § 301 preempts state [*4] law claims brought to enforce collective bargaining agreements.⁴ However, it does not preempt state law claims based on "non-negotiable rights"⁵ unless their resolution is "substantially dependent upon analysis of the terms" of a collective bargaining agreement.⁶

3 Cramer v. Consol. Freightways, 255 F.3d 683, 689 (9th Cir. 2001) (en banc) (as amended).

4 See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 403, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). See also Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1107 (9th Cir. 2000).

5 Livadas v. Bradshaw, 512 U.S. 107, 123-24, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994).

6 Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985).

The district court found § 301 preemption because Miguel's meal period claim "necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute."⁷ However, in Valles v. Ivy Hill Corp., this [*5] court subsequently held § 301 does not preempt § 512 meal period claims because the right to a § 512 meal period "is plainly nonnegotiable."⁸ Under Valles, Miguel's claim is not preempted and we lack jurisdiction.

7 Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 693 (9th Cir. 2001).

8 Valles v. Ivy Hill Corp., 410 F.3d 1071, 1082 (9th Cir. 2005).

REVERSED.

EXHIBIT D

LEXSEE 2007 US DIST LEXIS 48308

RAYMUNDO PEREZ, et al., Plaintiff, v. SAFETY-KLEEN SYSTEMS, INC., Defendant. DAVID STEGALL, Plaintiff, v. SAFETY-KLEEN SYSTEMS, INC., Defendant.

No. C 05-5338 PJH, No. C 07-0886 PJH

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 48308

June 27, 2007, Decided

June 27, 2007, Filed

COUNSEL: [*1] For Reymundo Perez, Jerrel Doane, individually, on behalf of all others similarly situated, and on behalf of the general public, Plaintiffs: Barron Edward Ramos, LEAD ATTORNEY, Kristen Elizabeth Caverly, Henderson & Caverly, Rancho Santa Fe, CA.; Jeremy R. Fietz, LEAD ATTORNEY, Donald S. Edgar, Rex Grady, The Law Office of Donald S. Edgar, Santa Rosa, CA.

For Safety-Kleen Systems, Inc., Safety-Kleen Corp., Defendants (3:05-cv-05338-PJH): Janine Syll Simerly, LEAD ATTORNEY, Cassandra H. Carroll, Robert W. Tollen, Seyfarth Shaw LLP, San Francisco, CA.

For David Stegall, an individual, on behalf of himself, those similarly situated and on behalf of the general public, Plaintiff: Barron Edward Ramos, LEAD ATTORNEY, Rancho Santa Fe, CA.; Donald S. Edgar, Jeremy R. Fietz, LEAD ATTORNEYS, The Edgar Law Firm, Santa Rosa, CA.; Jeremy R. Fietz, LEAD ATTORNEY, The Law Office of Donald S. Edgar, Santa Rosa, CA.; Kristen Elizabeth Caverly, LEAD ATTORNEY Henderson & Caverly, Rancho Santa Fe, CA.

For Safety-Kleen Systems, Inc., a Wisconsin corporation, Defendant (307-cv-00886-PJH): Janine Syll Simerly, LEAD ATTORNEY, Cassandra H. Carroll, Robert W. Tollen, Seyfarth Shaw LLP, San Francisco, CA.

JUDGES: PHYLLIS [*2] J. HAMILTON, United States District Judge.

OPINION BY: PHYLLIS J. HAMILTON

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant's Motion for Summary Judgment came on for hearing on May 30, 2007. Barron Ramos, Jeremy Fietz, Donald Edgar, and Kristin Caverly appeared for plaintiffs; Robert Tollen and Janine Simerly appeared for defendant. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS in part and DENIES in part defendant's motion for the following reasons and for the reasons stated at the hearing.

BACKGROUND

These actions arise from defendant Safety-Kleen Systems, Inc.'s ("Safety-Kleen") alleged failure to provide meal and rest breaks to its employees. There are two separate complaints at issue. Plaintiffs Reymundo Perez and Jerrell Doane allege the following causes of action in their complaint: (1) Unlawful Failure to Pay Required Overtime (Wage Order No. 7-2001, California Labor Code Sections 510, 1194, 1198); (2) Unjust Enrichment/Quantum Meruit; (3) Conversion; (4) Waiting Time Penalties (California Labor Code Section's 201-203); (5) Failure to Provide Itemized Wage Statements (California Labor Code Section 226); [*3] (6) Failure to Provide Meal Periods and Rest Breaks (California Labor Code Sections 226.7, 512, and Wage Order No. 7-2001); and (7) Unfair Practices Under Unfair Competition Act (California Business and Professions Code Sections 17200-17208). David Stegall's complaint alleges claims for: (1) Failure to Provide Meal Periods and Rest Breaks (California Labor Code Section 226.7); and (2) Unfair Practices Under Unfair Competition Act (California Business and Professions Code Sections 17200). Perez

and Doane's first and fourth causes of action (overtime and waiting time claims) were dismissed by stipulation on May 23, 2006. Defendant moves for summary judgment with respect to all other remaining causes of action in the two complaints.

A. Statutory Background

California Labor Code § 512 governs the provision of meal periods. This provision was enacted as part of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, 1999 Stats. Ch. 124 (AB 60). This statute provides that:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per [*4] day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

It also states that the Industrial Welfare Commission ("IWC") may adopt an order "permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees." Cal. Labor Code § 512.

In September of 2000, the California Labor Code was further amended to add another provision regarding meal and rest periods, providing that "[n]o employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." Cal. Labor Code § 226.7(a). It further states that if "an employer fails to provide an employee a meal period or rest period in [*5] accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Cal. Labor Code § 226.7(b).

Both labor code sections refer to IWC wage orders. Prior to enactment of Labor Code § 512, the IWC's wage orders required meal periods. It issued new wage orders in 2000, including Wage Order 7-2001 (effective January 1, 2001).¹ While the IWC was de-funded by the California Legislature effective July 1, 2004, its wage orders, which govern wages, hours and working conditions in California, are still in effect. Regarding meal periods, the IWC order states:

Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke [*6] the agreement at any time.

Wage Order 7-2001 P 11. It also governs rest periods, providing that:

Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.

1 Safety-Kleen concedes that Wage Order 7-2001 applies to its business. Plaintiff notes that Wage Order 4-2001 may also apply to Safety-Kleen's business, but acknowledges Wage Order 7-2001 applies for purposes of this motion.

In addition to providing for meal and rest periods, California law requires that employers provide itemized wage statements to their employees:

2007 U.S. Dist. LEXIS 48308, *

Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher [*7] paying the employee's wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Cal. Labor Code § 226(a).

B. Factual Background

Plaintiff Stegall was employed by Safety-Kleen from November 1998-November 2004 as a Customer Service Representative ("CSR"), an employee who drives a truck and visits Safety-Kleen's customers to service their equipment as part of Safety-Kleen's waste management services. Upon his employment, Stegall signed an agreement limiting his ability to commence suit against the company to six months after the employment action in dispute. He knew that employees in California had the right to take rest and meal breaks, but nobody at Safety-Kleen ever told him he was entitled to do so or [*8] that he could not do so. He felt that there was too much pressure to make his numbers to stop for breaks, but admitted that a person could arrive at work an hour earlier and take their breaks. He usually ate while driving, but took lunch breaks a few times a month. Safety-Kleen paid him a base salary plus commission.

Plaintiffs Jerrell Doane and Reymundo Perez were also employed by Safety-Kleen as CSRs. Doane was paid salary plus commissions. He was not paid by the hour, nor was he paid overtime. He knew that he was entitled to take breaks, but did not do so because he had too much work to do. Plaintiff Perez was paid salary plus commissions, but not overtime. Sometimes he took meal breaks. No supervisor ever told him not to, but none ever told him to do so. He did not know that he was entitled to take breaks.

All three plaintiffs received bi-monthly pay stubs that reflected they had worked 80 hours per pay period.

Plaintiffs maintain that, on average, they worked in excess of 100 hours per pay period.

DISCUSSION

A. Legal Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show [*9] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court must view the facts in the light most favorable to the non-moving party and give it the benefit of all reasonable inferences to be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof [*10] at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. *Id.* If the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some genuine issue for trial in order to defeat the motion. *See Fed. R. Civ. P. 56(e); Anderson*, 477 U.S. at 250.

"To show the existence of a 'genuine' issue, . . . [a plaintiff] must produce at least some significant probative evidence tending to support the complaint." *Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 963 (9th Cir. 1990) (quotations omitted). The court must view the evidence in the light most favorable to the non-moving party. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999). If the nonmoving party fails to show that there is a genuine issue for trial, "the moving party is entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323. Regardless

of whether plaintiff [*11] or defendant is the moving party, each party must "establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial." *Id.* at 322.

B. Defendant's Motion

Safety-Kleen moves for summary judgment on the following bases. First, it argues that all of Stegall's claims must be dismissed because his claims are limited by a contractual limitations clause. Second, Safety-Kleen argues that plaintiffs' claims for meal and rest period violations fail, because it provided them with those break periods. Third, Safety-Kleen maintains that plaintiffs cannot recover for its failure to accurately record their hours worked, because they cannot show the requisite injury and intent.

1. Stegall's Claims

Safety-Kleen first argues that Stegall's claims must be dismissed because he signed an agreement with Safety-Kleen that he would not commence any action or suit against it more than six months after the employment action in dispute. He terminated his employment in November 2004 and did not commence suit until September 28, 2006. Specifically, Stegall signed the same agreement twice -- on October 27, 1998 and November 30, 1998 -- which stated that "Employee [*12] further agrees. . . [t]hat Employee will not file a charge or complaint or commence any action or suit relating to Employee's employment with Safety-Kleen more than six months after the employment action in dispute and that Employee waives any statute or limitations to the contrary."

The Ninth Circuit has analyzed contractual six-month limitation provisions under California law, noting that "[m]any California cases have upheld contractual shortening of statutes of limitations in different types of contracts, including employment situations." *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001) (upholding summary judgment in defendant's favor). The Ninth Circuit has found that such provisions are not unconscionable under California law. Even though plaintiffs in *Soltani* submitted evidence of procedural unconscionability, the court found that "California case law strongly indicates that the six-month limitation provision is not substantively unconscionable." *Id.* at 1043 (citations omitted). "Given a sliding scale analysis, even assuming that the contract was a non-negotiable adhesion contract, the substantive prong controls. Indeed, California courts have upheld shortened [*13] limitation periods in insurance contracts, which are quintessential adhesion contracts." *Id.* at 1044-45.

The contractual agreement signed by Stegall is therefore valid and enforceable. While Stegall argues

that the contract lacks foundation and has not been properly authenticated, Stegall admits that the signatures on the contracts are his own. While he testified that he does not recall signing the contracts, he authenticated the document by authenticating his signature on the contract. *See* Fed. R. Evid. 901(b)(2). Plaintiff provides no evidence suggesting that the document is fraudulent, and it is therefore admissible.

Stegall also maintains that California Labor Code § 219 makes the contract unenforceable, as it states "[n]othing in this article shall in any way limit or prohibit the payment of wages at more frequent intervals, or in greater amounts, or in full when or before due, but no provision of this article can in any way be contravened or set aside by private agreement, whether written, oral, or implied." The article to which Labor Code § 219 refers includes Labor Code § 226.7, which governs the right to meal and rest periods. The contract Stegall signed, however, did not "contravene" [*14] or "set aside" his right to meal and rest periods -- it shortened the time period in which he could bring suit against Safety-Kleen. The statute of limitations for meal and rest period claims is not governed by the Labor Code -- it is set by Code of Civil Procedure § 338. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1101, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (2007). Labor Code § 219, therefore, does not invalidate Stegall's contract.

Stegall also argues that Safety-Kleen waived the 6-month contractual limitation defense. However, "an affirmative defense based upon a contractual limitations period may be raised for the first time on summary judgment if no prejudice is caused to the nonmoving party." *Han v. Mobil Oil Corp.*, 73 F.3d 872, 878 (9th Cir. 1995). Stegall does not claim prejudice. In any event, Safety-Kleen specifically asserted the contractual limitation defense in its answer to Stegall's amended complaint.

Finally, Stegall claims that Safety-Kleen's May 2004 employee handbook superseded the agreement containing the contractual limitations clause, because the handbook explicitly supersedes "all previously issued handbooks, prior statements by the Company or by any employee of the Company, and [*15] any other document inconsistent with this Employee Handbook and the policies and procedures herein." However, a contract in writing may be modified only by another contract in writing, by an oral agreement to the extent it is executed by the parties, or by an oral agreement supported by new consideration. Cal. Civil. Code § 1698. The handbook explicitly states that it is not a contract and may be unilaterally changed by the company, so it does not have the power to alter the 1998 contracts. In addition, the handbook does not address when suit may be brought against the company and does not contradict the con-

tracts. Nor does the handbook's provision that state law "shall control" in "the event of a conflict" between such laws and the handbook invalidate the contractual limitation, as state law allows contractual modification of statute of limitations. Summary judgment, therefore, is proper as to all of Stegall's claims, as they are barred by the contractual limitations clause.

2. Meal and Rest Period Claims

"An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes," although the [*16] meal period may be waived by "mutual consent" under certain S conditions. Nor may an employer "employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes" except that this period may also be "waived by mutual consent" in certain circumstances. Cal. Lab. Code § 512(a).

Safety-Kleen argues that the statute only requires that an employer "provide" an employee with a meal period, meaning that defendant need only "furnish, supply, make available, or afford" such breaks. Safety-Kleen argues that "the nature of plaintiffs' work" provided them with the opportunity to take meal periods, because plaintiffs were truck drivers working solo away from the employer's premises. There is no authority to support Safety-Kleen's argument that merely being off-site and away from management constitutes "provision" of breaks. Certainly, employers could instruct their drivers not to take breaks, or otherwise imply that they may not take breaks. Just because an employee works on the road does not end the inquiry as to whether meal periods were provided under the statute.

The court has examined all of the facts here in [*17] a light most favorable to plaintiffs and finds a dispute as to whether Safety-Kleen "provided" meal periods. Safety-Kleen has no policy regarding meal breaks for CSRs. Safety-Kleen does not have a method of determining how many hours a CSR in California works during the day. *See Williams Depo. Tr.* at 102, 135. Only since May 2004 have Safety-Kleen's employees had an employee handbook which states "your manager is responsible for providing you the local procedures regarding breaks and meal periods, subject to state and local laws and regulations. If you are a non-exempt employee, you are required to take one meal break of at least 30 minutes each workday." This handbook does not state that exempt employees have a right to a meal period as well.

Stegall, Perez, and Doane all declare that they were never relieved of all duty during any meal or break period. They were on call at all times and were required to

carry a company cell phone to maintain constant contact with the branch. They were required to complete a detailed log each day which specifically stated they were on duty from the time they arrived at the branch until going home at the end of the day. *See Stegall Decl. P 7; Perez [*18] Decl. P 6; Doane Decl. P 6.*

At his deposition, Stegall testified that the Safety-Kleen managers never told him to stop and take a meal or rest breaks during the day. Nor did they tell him not to. *See Stegall Depo Tr.* at 43-44. He knew there were posters at the branch where he worked, but never saw a poster about the right to take rest breaks and meal breaks. *Id.* at 45. He recalls one time when another employee was criticized by the manager for stopping to have breakfast with another employee. *Id.* at 46. There was a lot of pressure to hit revenue numbers each day, and the customers they were servicing closed around 4:00 or 5:00 p.m. The CSRs attended weekly meetings stressing revenue and productivity, and the employees were questioned about how many customers they serviced during the day. *Id.* at 51, 83.

While Stegall knew he had a right to breaks based on prior work experience, Perez testified that he knew nothing about his right to take a rest or meal break when he worked for Safety-Kleen. *Perez Depo. Tr.* at 22. He was never told to make sure he took his break, or that he had a right to a break, or to record his breaks. He was only told to go out there and get his work done. *Id.* at 23. [*19] He also said that he did not take breaks because he had too much work to do, and he did not want to work later. Nobody ever told him not to take breaks, but he does not recall anyone telling him to take breaks. He speculated that 1 other employees decided whether or not to take a rest break. *Id.* at 72. Doane stated that the handheld he was given by Safety-Kleen would say "break" on it, but sometimes it would list no breaks on a given day. Doane knew from prior experience that he had a right to take a meal break and that he was entitled to two short rest breaks for an eight hour shift, but he did not know how long these breaks were supposed to be. *Id.* at 57. His supervisor did not encourage him to take breaks. He speculates that "the ultimate decision [whether to take breaks] was mine." *Id.* at 71.

There is a genuine issue of material fact as to whether Safety-Kleen provided meal periods to plaintiffs, particularly given the lack of a policy for meal breaks, the fact that plaintiffs were never told to take breaks, the fact that Perez did not even know he had a right to take breaks, the general pressures of the position, and the fact that plaintiffs were required to fill out a call log [*20] stating they were on duty all day long. These facts also reveal a dispute as to whether Safety-Kleen "authoriz[ed] and permit[ted] rest periods" as required by Wage Order 7-2001 P 12. *See also Cal. Labor Code §*

226.7 (authorizing pay where "employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission").

In light of the above, the court need not resolve plaintiffs' argument that California law "does not permit an employee . . . to decide to take a break or not take a break." The court, however, notes that the applicable IWC Wage Order indicates that an employer must do something affirmative to provide a meal period, and may not merely assume such breaks are taken. The Wage Order states that "[n]o employer shall employ any person for a work period of more than five hours without a meal period of not less than thirty minutes," and also states that "unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked." IWC Wage Order 7-2001. While Safety-Kleen argues that this IWC Order is not within the scope of [*21] the authority conferred by the legislature because its mandatory language contradicts Labor Code § 512, the court need not resolve this issue. At the very least, consistent with Labor Code § 512, the Wage Order requires the employer to affirmatively provide a meal break and provide the opportunity for the employee to be "relieved of all duty during a 30 minute meal period."

This result is consistent with California court decisions on meal and rest period provision. In *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 35 Cal. Rptr. 3d 243 (2005), the California Court of Appeals reversed the trial court's grant of summary judgment in defendant's favor on violations of California statute and regulations relating to meal periods, rest breaks, and itemized wage statements. Regarding meal periods, the court first noted that the evidentiary burden rests with the employer, and the employer's failure to keep the required statutory records falls on it. *Id.* at 961. Defendant's manager declared that the drivers were protected by a collective bargaining agreement that provided them with meal breaks, and that they were constantly on the road, had the power to decide whether to take breaks, and so their activity [*22] could not be regulated by defendant. Defendant assumed that the drivers took breaks. *Id.* at 962. The court found that defendant had the ability to monitor its drivers' activities, and did so with respect to other activities. The court found "defendant's obligation to provide the plaintiffs with an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" *Id.* (citing DLSE Opinion Letter No. 2002.02.28 (Jan. 28, 2002)). The court also found that defendant did not "authorize and permit" rest periods as required, noting that defendant's computer system did not contain a code for

rest breaks and that drivers felt pressured not to take such breaks because they were not on a list of paid delays. *Id.* at 963. The employer petitioned for review, but the petition for review by the Supreme Court was denied.

Similar to the employer in *Cicairos*, Safety-Kleen assumed that plaintiffs knew they had the right to take a meal break without ever actively providing breaks (or even telling its employees they had that right) or monitoring whether breaks were taken. Safety-Kleen [*23] argues that *Cicairos* carries little weight, because it relied on a DLSE opinion letter which has no legal force or effect, and, in any event, DLSE subsequently changed its position to state that the Labor Code required that the employer "make a meal period available and to give the employee an opportunity to take it." But even if Safety-Kleen is correct and it had no "affirmative obligation to ensure" that its workers are actually relieved of duty, it was obligated to provide off-duty meal and rest breaks. *See Murphy*, 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (California's meal time provisions are to be "interpreted broadly in favor of protecting employees").

In light of the disputed facts here, summary judgment is not proper as to Perez and Doane's claims for meal and rest period violations. Stegall's claims, however, fail for the contractual limitations reasons discussed above. Summary judgment is also denied as to Perez and Doane's derivative claims (California Business and Professions Code § 17200, unjust enrichment, quantum meruit, and conversion). These claims are predicated on Safety-Kleen's alleged failure to provide meal and rest periods, and Safety-Kleen argued no separate grounds for dismissing these [*24] claims.

3. Itemized Wage Statement Claim

Safety-Kleen concedes it failed to record total hours worked on plaintiffs' wage statements as it was obligated to do under California Labor Code § 226(a)(2). But it argues that plaintiffs cannot prove the requisite intent or injury under the statute, which provides that "[a]n employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover . . . not exceeding an aggregate penalty of four thousand dollars." Cal. Labor Code § 226(e).

Safety-Kleen maintains that its failure to accurately record the number of hours was not "knowing and intentional" because defendant was unaware that recording the number of hours was required under California law. Defendant, however, concedes that it knowingly and intentionally provided wage statements containing the incorrect total hours worked. Ignorance of the law, however, does not excuse Safety-Kleen. *See People v. Snyder*, 32 Cal. 3d 590, 592-593, 186 Cal. Rptr. 485, 652 P.2d 42 (1982) ("It is an emphatic postulate of both civil and

penal law that ignorance of a law is no excuse for a violation thereof." In *Wang v. Chinese Daily News, Inc.*, 435 F. Supp. 2d 1042 (C.D. Cal. 2006), [*25] the court found a violation of California Labor Code § 206, noting that defendants conceded they knew their wage statements did not comply with California law, citing to evidence that the wage statements always listed their hours at 86.66. *Id.* at 1051. So too here, where Safety-Kleen's statements always list 80.00 hours per two week period regardless of hours actually worked. The *Wang* court also noted that defendants had the "responsibility to ameliorate the problem," but their failure to do so and their position that the "violations are merely technical also demonstrate that the violations were knowing and intentional." *Id.* Here, Safety-Kleen's own person most knowledgeable testified that Safety-Kleen has no method of calculating how many hours a CSR works in a given day, indicating it has not ameliorated the problem, even though it issued a California law handbook in 2005. Therefore, there is a question of fact as to Safety-Kleen's intent, and summary judgment is improper on this basis.

Regarding the statute's injury requirement, Safety-Kleen argues that neither Perez nor Doane were injured by the omission of accurate hours on their wage statement, because they were salaried employees [*26] who were not paid overtime. While plaintiffs do not make any claim that they are entitled to overtime, the "lawsuit, and the difficulty and expense Plaintiffs have encountered in attempting to reconstruct time and pay records, is . . . evidence of the injury suffered as a result of [the] wage statements." *Wang*, 436 F. Supp. 2d at 1050. Plaintiffs will need to engage in "discovery and

mathematical computations" in order to calculate meal and rest period payments they claim they are entitled to. *Id.* Plaintiffs testified that they typically worked 100 hours or more per two week period, and took rest and meal periods rarely, if at all. While it is true that the employer bears "the consequences for . . . failure" to keep records under the statute, plaintiffs will have to determine their own damages for missed meal and rest periods due to the absence of records. *Cicairos*, 133 Cal. App. 4th at 961. This is sufficient to establish a triable issue as to injury. Summary judgment on this claim is therefore not proper at this time.

CONCLUSION

In accordance with the foregoing, the court GRANTS in part and DENIES in part defendant's motion.

Summary judgment is GRANTED as to Stegall's claims. This order [*27] terminates the *Stegall* case (Case No. C 07-0886 PJH) and any pending motions in that case. The clerk shall close that case file.

Summary judgment is DENIED as to the claims in the *Perez* case (Case No. C 05-5338 PJH).

IT IS SO ORDERED.

Dated: June 27, 2007

PHYLLIS J. HAMILTON

United States District Judge

EXHIBIT E



SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

FILED
ALAMEDA COUNTY

NOV 06 2003

CLERK OF THE SUPERIOR COURT
By Charlotte Marin Deputy

ANDREA SAVAGLIO, JAMES DAVIS,
JERRILYN NEWLAND, and CHARLOTTE
JOHNSON, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

WAL-MART STORES, INC., a Delaware
corporation, SAM'S WEST, INC., a California
corporation, GEORGE RODRIGUEZ, VINCENT
MARTINEZ, and DOES 1 through 100,

Defendants.

Case No.: C-835687

ORDER (1) GRANTING CLASS
CERTIFICATION IN PART AND (2)
DENYING CLASS CERTIFICATION IN
PART.

DATE: September 15, 2003
TIME: 9:00 am
DEPT: 22

The motion by plaintiffs for class certification came on regularly for hearing on
March 19, 2003, in Department 22, the Honorable Ronald M. Sabraw, presiding.
Plaintiffs and Defendant appeared at the hearing through counsel of record.

The oral argument of the parties on March 19, 2003, was very helpful and assisted
the Court in focusing on the issues in the motion. Because the Court identified issues not
briefed thoroughly by the parties, the Court requested further briefing and set a second
hearing. The parties submitted additional briefing and evidence, and the Court held a
second hearing on September 15, 2003.

IT IS HEREBY ORDERED that plaintiffs' motion for class certification is
GRANTED IN PART and DENIED IN PART.

Y
07 2003

SUMMARY

This is a purported class action by associates of Wal-Mart (Wal-Mart refers to its employees as associates). Plaintiffs divided the factual basis for their claims into three categories (1) failure to pay for work off the clock ("OTC") (2) failure to pay when rest breaks were missed, shortened or interrupted; and (3) failure to pay when meal periods were missed, shortened or interrupted. The legal theories of recovery in the Second Amended Complaint filed March 27, 2002, fall into four categories: (1) contract claims (causes of action 1-4, 8); (2) Labor Code claims (causes of action 5, 9-11); (3) equitable claims based on unjust enrichment and conversion (causes of action 6-7); and (4) a claim under the Unfair Competition Law, Business and Professions Code 17200 ("UCL") (cause of action 13). Plaintiffs are not seeking class certification on their claim for promissory estoppel (cause of action 12).

Because commonality must be determined with reference to the claims in the case, the Court defines the elements of the OTC, rest break, and meal period claims. Under California law Plaintiffs must prove the following to establish their claims:

OTC Claims - Plaintiffs must prove that Defendant knowingly did not pay them for all the time they worked or were under Defendant's control.

Rest Break Claims - Plaintiffs must prove that Defendant coerced or encouraged them not to take the full rest breaks permitted by the Labor Code or by contract.

Meal Period Claims - Plaintiffs must prove that Defendant did not ensure that they took the full meal periods required by the Labor Code or by contract.

Applying the analytical categories of *Bell v. American Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1603-1609, and Federal Rules of Civil Procedure ("F.R.C.P.") Rule

23, the Court considers separately whether to certify each claim to pursue injunctive relief and monetary relief.

The Court holds (1) Plaintiffs may represent a class to pursue OTC claims and seek injunctive relief under the Labor Code and the UCL; (2) Plaintiffs may represent a class to pursue rest break claims and seek injunctive relief under the Labor Code and the UCL; (3) Plaintiffs may represent a class to pursue meal period claims and seek injunctive relief under the Labor Code and the UCL; and (4) Plaintiffs may represent a class to pursue meal period claims and seek monetary relief under the Labor Code and the UCL.

Below is a table identifying the claims that will proceed on behalf of a class:

	Contract	Labor Code	Equitable	UCL Unlawful	UCL Unfair	UCL Fraudulent
OTC – Injunction		OTC Class		OTC Class	OTC Class	OTC Class
OTC – Money						
Rest Breaks - Injunction		Rest Break Class		Rest Break Class	Rest Break Class	Rest Break Class
Rest Breaks – Money						
Meal Periods- Injunction		Meal Period Class		Meal Period Class	Meal Period Class	Meal Period Class
Meal Periods - Money		Meal Period Money Class		Meal Period Money Class	Meal Period Money Class	Meal Period Money Class

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1
2 LEGAL FRAMEWORK

3 The guiding principles for deciding a motion for class certification are well
4 defined. "To obtain certification, a party must establish the existence of both an
5 ascertainable class and a well-defined community of interest among the class-members."
6 *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (citing *Richmond v. Dart Industries,*
7 *Inc.* (1981) 29 Cal.3d 462); *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th
8 1096, 1104. The latter inquiry involves the following three factors: (1) predominant
9 common questions of law or fact; (2) class representatives with claims or defenses typical
10 of the class; and (3) class representatives who can adequately represent the class.
11 *Richmond, supra*, 29 Cal.3d at 470.
12

13
14 Other relevant considerations include the probability that each class member will
15 come forward ultimately to prove his or her separate claim to a portion of the total
16 recovery and whether the class approach would actually serve to deter and redress alleged
17 wrongdoing. *Linder*, 23 Cal.4th at 429. In addition, the trial court should assess whether
18 a class action is superior to alternative procedures for handling the controversy. *Basurco*
19 *v. 21st Century Ins. Co.* (2003) 108 Cal. App. 4th 110, 120-122; *Caro v. Procter &*
20 *Gamble Co.* (1993) 18 Cal. App. 4th 644, 660-662.
21

22 The determination of whether a class should be certified is a procedural question
23 and does *not* include a weighing of whether the action is legally or factually meritorious.
24 *Linder*, 23 Cal.4th at 439-40.
25

26 The Court rejects any suggestion that doubts as to the propriety of class
27 certification must be resolved in favor of certification, subject to later modification by the

1 Court. (P's MPA at 12:9-11) *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.
2 4th 906, 923, 924, states that "at the time of certification" a plaintiff must provide
3 sufficient information for the trial court to determine whether a class action will be
4 manageable and that the court cannot simply rely on counsel's assurances of
5 manageability. Similarly, *Reyes v. Board of Supervisors* (1987) 196 Cal. App. 3d 1263,
6 1275, states, "[W]here the court finds, on the basis of substantial evidence . . . that there
7 are serious problems *now appearing*, it should not certify the class merely on the
8 assurance of counsel that some solution will be found."

9
10 Class certification should be decided "when practicable," C.R.C. 1854(b), so that
11 the parties will know the contours of the case well prior to trial and absent class members
12 can be provided notice and an opportunity to opt out of the class. C.R.C. 1856. The
13 Court may not certify a claim for class treatment and leave it to a jury to determine
14 whether the plaintiffs can prove their theory that there is a common practice that affects
15 all class members. It is the duty of the Court, not the jury, to determine whether common
16 issues predominate to such a degree that absent class members may, after notice, be
17 bound by and benefit from the judgment and the defendant may be held liable to such
18 persons.
19
20

21 Although California Courts rely on and refer to federal law, *Washington Mutual*
22 *Bank v. Superior Court* (2001) 24 Cal. 4th 906, 922, C.C.P. section 382 does not include
23 specific standards and analytical categories such as those found in F.R.C.P. 23. A party
24 moving for class certification in a California Court is not required to state whether class
25 certification is sought under the equivalent of F.R.C.P. 23(b)(1), (2), or (3). Therefore,
26
27

1 the parties rarely present the issue of whether a case should proceed as an injunction only
2 class (as under 23(b)(2)) or as an injunction and damages class (as under 23(b)(3)).

3 Consistent with the direction in *Vasquez v. Superior Court of San Joaquin County*
4 (1971) 4 Cal. 3d 800, 821, that "we must rely upon the ability of trial courts to adopt
5 innovative procedures which will be fair to the litigants and expedient in serving the
6 judicial process," the Court has considered each claim from two perspectives. First, the
7 Court has considered whether it would be appropriate to certify a class to pursue claims
8 regarding the content and overall implementation of Wal-Mart's policies (similar to class
9 certification under F.R.C.P. 23(b)(2)). The Court notes that there is a substantial overlap
10 between the attributes of a representative UCL claim and the attributes of an injunction
11 only class claim. Second, the Court has considered whether it would be appropriate to
12 certify a class to pursue an aggregation of individual claims seeking monetary relief
13 (similar to class certification under F.R.C.P. 23(b)(3)). Considering class certification
14 issues related to claims for injunctive relief and claims for monetary relief separately is
15 consistent with California law. *Bell v. American Title Ins. Co.* (1991) 226 Cal. App. 3d
16 1589, 1603-1609 (applying analytical categories of the federal rules in California class
17 action). See also *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th
18 695, 704-705 (noting that complex cases require "exceptional judicial management" and
19 to achieve that end the trial courts "have the authority to take whatever exceptional
20 management actions are necessary to accomplish that result.")
21
22
23
24

25 ///

26 ///

27

1 ASCERTAINABILITY

2 Ascertainability requires that the Court and the parties be able to determine who is
3 in the class based on objective characteristics and common transactional facts. *Hicks*, 89
4 Cal.App.4th at 913-916; *Bartold v. Glendale Federal Bank* (2000) 81 Cal. App. 4th 816,
5 828. Several cases hold that a class is not readily ascertainable if the class definition
6 requires the Court to conduct individual inquiries to determine whether each potential
7 class member is included in the class. *Kenro, Inc. v. Fax Daily* (S.D. Ind. 1997) 962 F.
8 Supp. 1162, 1169; *Petty v. Wal-Mart Stores, Inc.* (Ohio App. 2002) 773 N.E.2d 576, 579-
9 580, *rev. denied*, 772 N.E.2d 1203. Although *Hicks* states that a class definition can
10 include a reference to the elements of the claim, *Hicks*, 89 Cal.App.4th at 915-916, the
11 reasoning of *Hicks* suggests that this is to be discouraged.
12

13
14 Plaintiffs propose a class of all hourly associates during the relevant time frame.
15 Plaintiff's proposed class is ascertainable, and can be identified through payroll records
16 and other documents in the possession of Wal-Mart. Consistent with *Hicks*, the class
17 definition does not incorporate the element of the claim.

18
19 Wal-Mart argues that the proposed class definition is overbroad because it
20 encompasses many persons who are not similarly situated with the named Plaintiffs. This
21 argument raises issues of commonality, but does not concern whether the proposed class
22 is ascertainable.

23 The Court finds that the class proposed by Plaintiff is ascertainable and
24 appropriate for the OTC, rest break, and meal period claims. Wal-Mart and absent class
25 members can determine membership in the class without a detailed inquiry into the
26 circumstances or time records of any given class member.
27

1
2 NUMEROSITY

3 Wal-Mart has admitted that the proposed class includes over 5,000 members, and
4 other evidence indicates that the class includes over 50,000 members. (PX 43, RFA #10
5 and PX 44.) Wal-Mart does not contest the numerosity requirement.
6
7

8 COMMONALITY - INTRODUCTION

9 Plaintiffs' burden on moving for class certification is not merely to show that
10 some common issues exist. Plaintiffs must place substantial evidence in the record that
11 common issues predominate. *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th
12 1096, 1108.
13

14 The commonality analysis requires the Court to examine the elements of each
15 cause of action. If the law applicable to a cause of action is unclear, then the Court may
16 need to ascertain the law before it can determine whether common issues predominate on
17 the cause of action. *Hicks*, 89 Cal.App.4th at 916, fn22 and 917-918 ("In order to
18 determine whether common questions of fact predominate the trial court must examine
19 the issues framed by the pleadings and the law applicable to the causes of action
20 alleged.")
21

22 In the initial round of briefing it became apparent that the parties did not agree on
23 the elements of rest break and meal period claims. Therefore, the Court requested further
24 briefing and set a second hearing. See *Bacon v. Southern Cal. Edison Co.* (1997) 53
25 Cal.App.4th 854, 860. As a result, in defining the elements of the claims the Court is not
26 impermissibly reaching merits issues without adequate notice to the parties. *Linder*, 23
27

1 Cal.4th at 443, states expressly that "trial courts retain broad discretion to conduct the
2 proceedings in an orderly and just manner" and may address the merits of a case on class
3 certification where the merits are enmeshed with class action requirements. This is such
4 a case, although even here the Court determines only the elements of the claims, not
5 whether Plaintiffs are likely to prevail when the law is applied to the facts of the case.
6

7 Commonality is determined separately with reference to each cause of action, for
8 there may be causes of action where common facts and issues of law predominate and
9 other causes of action where they do not. *Fletcher v. Security Pacific National Bank*
10 (1979) 23 Cal.3d 442, 447-454 (class certified on claims where individual reliance not at
11 issue and not certified on contract claim where individual knowledge was at issue).
12

13 The Court finds that the claims break down into three categories: (1) work OTC;
14 (2) rest breaks, and (3) meal periods. There are significant distinctions among these
15 claims, so they must be treated differently.
16

17 COMMONALITY - ELEMENTS - OTC CLAIM
18

19 Although there is no single California statute or Wage Order that states so
20 explicitly, it is the law that employers must pay employees the agreed upon wage for "all
21 hours worked." Addressing this issue indirectly, paragraph 4 of the applicable California
22 Wage Orders states that employers must pay their employees the minimum wage for "all
23 hours worked." Paragraph 2(g) of the Wage Orders define "hours worked" as "the time
24 during which an employee is subject to the control of an employer, and includes all the
25 time the employee is suffered or permitted to work, whether or not required to do so."
26 *Morillion v. Royal Packing* (2000) 22 Cal.4th 575, 585, indicates that "hours worked"
27

1 includes all time that an employee is subject to the control of the employer or is working
2 with the knowledge of the employer. Therefore, to state their OTC claims, Plaintiffs must
3 prove that Wal-Mart did not pay them for all the time they were under its control or
4 worked with its knowledge.
5

6
7 COMMONALITY - ELEMENTS - REST BREAK CLAIM

8 The rest break claims are based on paragraph 12 of the applicable California
9 Wage Orders, which state, "Every employer shall authorize and permit all employees to
10 take rest breaks ..." The rest breaks are to be "at the rate of 10 minutes net rest time per
11 four (4) hours or major fraction thereof." Regarding pay, "Authorized rest period time
12 shall be counted as hours worked for which there shall be no deduction from wages."
13 Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶12(A).
14

15 There is no clear statutory or case law guidance on what elements an employee
16 must prove to establish a violation of the rest break provisions. The Court must
17 determine the elements of the claim so it can determine whether common facts
18 predominate with respect to the claim.
19

20 The Court holds that the Wage Orders require employers to make rest breaks
21 available to employees, but do not require employers to ensure that the employees take
22 the full time allotted for those breaks. The Court reaches this conclusion based on its
23 consideration of (1) the language in the Wage Orders; (2) recent amendments to the Labor
24 Code; (3) applicable case law; (4) DLSE advice letters and the DLSE Manual, (5) the
25 relevant public policies, and (6) the practicalities of the workplace.
26
27

1 First, the Wage Orders state that "Every employer shall authorize and permit all
2 employees to take rest breaks ..." The critical phrase is "authorize and permit."
3 Plaintiffs argue this term means "require," and Wal-Mart argues the term means "allow."
4 When used by the Legislature in other contexts, the phrase "authorize or permit" appears
5 to be synonymous with "allow." In several statutes the phrase "authorize or permit" could
6 be replaced with "allow" without altering the apparent meaning of the statute, whereas
7 replacement of "authorize or permit" with "require" would lead to strained or nonsensical
8 language. See, e.g., Business and Professions Code 20999(c); Cal. Ed Code 1270.1; Cal
9 Gov Code § 6546.1; Cal. Health and Safety Code 1371.3; Unemployment Insurance Code
10 1095(t).
11

12 Case law addressing other issues indicates that "authorize and permit" means that
13 the subject matter is allowed, not that it is required. In *Haggis v. City of Los Angeles*
14 (2000) 22 Cal. 4th 490, 498, the Court held that a city could not be held liable to a
15 purchaser of real estate for failing to record information about landslide conditions. In
16 reaching that decision, the Court applied Government Code 815.6 and stated, "First and
17 foremost, application of section 815.6 requires that the enactment at issue be *obligatory*,
18 rather than merely discretionary or permissive, in its directions to the public entity; it
19 must *require*, rather than merely authorize or permit, that a particular action be taken or
20 not taken." In that context, the Court equates the phrase "authorize and permit" with
21 matters that are discretionary or permissive and places them in contrast to matters that are
22 obligatory or required.
23
24

25 Second, the Legislature has recently enacted two statutes that address rest breaks.
26
27

1 Labor Code 2695.2(d) (effective 2001) deals with sheepherders and states, "To the
2 extent practicable, every employer shall authorize and permit all sheepherders to take rest
3 periods." The Legislature presumably intended the phrase "authorize and permit" to have
4 the same meaning as in other statutes ("allow") and that this meaning be consistent with
5 the meaning of "authorize and permit" in the Wage Orders.
6

7 Labor Code 226.7 (effective on January 1, 2001) deals with all hourly employees
8 and states, "No employer shall require any employee to work during any meal or rest
9 period" and "If an employer fails to provide an employee a meal period or rest period ... ,
10 the employer shall pay the employee one additional hour of pay at the employee's regular
11 rate of compensation for each work day that the meal or rest period is not provided." The
12 language in this section is ambiguous as to whether rest breaks must be allowed or
13 required. The section states "No employer shall require" and "If an employer fails to
14 provide ... ," neither of which addresses the allow/require distinction. Noticeably absent
15 is direct mandatory language such as "An employer must require ..." or "If an employer
16 fails to ensure"
17

18 Third, case law does not clarify whether rest breaks must be allowed or required.
19
20 *California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95,
21 115, states paragraph 12 in California wage orders "provides a mandatory 10-minute rest
22 period net, for every 4 hours work, without wage deductions." *California Manufacturers*
23 did not, however, concern the distinction between a mandate that rest periods be offered
24 by employers and a mandate that they be taken by employees. *In re Marriage of Cornejo*
25 (1996) 13 Cal.4th 381, 387-388 ("It is axiomatic that cases are not authority for
26 propositions not considered.").

Fourth, documents issued by the California Division of Labor Standards Enforcement ("DLSE") indicate that employers must allow employees to take rest breaks but are not required to ensure that employees take those breaks. The Court takes judicial notice of DLSE advisory letters dated September 17, 2001, and January 28, 2002, where the DLSE states "an employer is not subject to any sort of penalty or premium pay obligation if an employee who was truly authorized and permitted to take a rest break, as required under the applicable wage order, freely chooses without any coercion or encouragement to forego or waive a rest period." (D's RJN filed 6/9/03 at Exh C and D.) Advice letters of this sort "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Bell v. Farmers Ins. Exch.* (2001) 87 Cal. App. 4th 805, 815.

The Court has also taken judicial notice of the DLSE Enforcement Policies and Interpretations Manual. (PX 81.) Plaintiffs argue that the reference to "net" time indicates that employers must ensure a full 10 minute rest period. (PX 81, para 45.3.3.) The Court finds that although the Policies and Interpretations Manual clarifies that employers must make 10 minutes of "net" time available for employees, it does not state that employers must require employees to take full net 10 minute breaks.

The Court observes that section 45.2.1 concerning meal periods is entitled "Regulation Clearly Places Burden on Employer to Insure [sic] Meal Period" and states in the text, "It is the employer's duty to compel the worker to cease work during the meal period." Section 45.3 et seq concerning rest breaks contains no similar heading or text,

1 indicating that the DLSE does not interpret the Wage Orders to require employers to
2 compel workers to cease work during rest breaks.

3 The Court also notes that the express statements in the advice letters are
4 considerably more specific than the general statements in the Manual. Where a specific
5 statement conflicts with a general inference, the Court is inclined to follow the specific
6 statement. C.C.P. 1859.

7
8 Fifth, the Court has considered the relevant public policies. There is a public
9 policy that employees must have the option of taking rest breaks to rest, go to the toilet,
10 and similar matters. *California Manufacturers*, 109 Cal. App. 3d 95, 115; DLSE
11 Enforcement Policies and Interpretations Manual, para 45.3.3 (PX 81). It is less clear
12 whether public policy would require employees to take their breaks.
13

14 Sixth, the Court has considered the practicalities of the workplace. Employers
15 generally determine when any given employee gets to take his or her break. In legal
16 terms, rest periods are paid time that counts as "hours worked" and "hours worked" is
17 defined as when an employee is subject to the control of an employer. *Morillion v. Royal*
18 *Packing* (2000) 22 Cal.4th 575, 578. Therefore, a rest period can be viewed as an
19 assignment from the employer that an employee accepts just as the employee would
20 accept an assignment to stock shelves or work a cashier. Plaintiffs assert that when a
21 Wage Order requires an employer to assign an employee to a 10 minute break, that the
22 employer must require the employee to take a full 10 minute break. The Court finds that
23 the better view is that the Wage Orders require employers to assign employees to rest
24 breaks, and that if an employee completes the assignment to his or her satisfaction in less
25 than 10 minutes then the employee can voluntarily elect to move on to other assignments.
26
27

1 The Court concludes that employers must allow their employees to take net 10
2 minute rest breaks, but employer are not liable if their employees voluntarily elect not to
3 take all the allotted rest time. The phrase "authorize and permit" in the Wage Orders and
4 in Labor Code 2695.2(d) indicates that the employees must be provided the option to take
5 rest breaks, not that they must take those breaks. Furthermore, the DLSE advice letters
6 are compelling evidence that the DLSE does not expect employers to require employees
7 to take rest breaks. The relevant public policies are served even if an employee who is
8 truly authorized and permitted to take a rest break freely chooses without any coercion or
9 encouragement to forego or waive his or her rest break.
10
11

12
13 COMMONALITY - ELEMENTS - MEAL BREAK CLAIMS

14 The meal break claims are based on Labor Code 512 and paragraph 11 of the
15 applicable California Wage Orders. Labor Code 512 states, "An employer may not
16 employ an employee for a work period of more than five hours per day without providing
17 the employee with a meal period of not less than 30 minutes" The applicable
18 California Wage Orders state at paragraph 11, "No employer shall employ any person for
19 a work period of more than five (5) hours without a meal period of not less than 30
20 minutes ..." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶11(A).

22 The Court holds that the Labor Code and the Wage Orders require employers to
23 ensure that employees take full 30 minute meal breaks. The Court reaches this
24 conclusion based on its consideration of (1) the language in the Labor Code; (2) the
25 language of the Wage Orders; (3) applicable case law; (4) the DLSE Manual, and (5) the
26 relevant public policies.
27

1 First, the language of the statute is vague. Labor Code 512 is ambiguous as to
2 whether an employer's obligation to "provide" a meal break requires the employer to
3 make a meal break of 30 minutes available or to ensure that a meal break of 30 minutes is
4 taken. Labor Code 226.7 (effective on January 1, 2001) is similarly ambiguous.

5 Second, the Wage Orders indicate that every person who works for more than five
6 hours must be offered and must take a meal period of not less than 30 minutes. Paragraph
7 11 of the Wage Orders state "No employer shall employ any person for a work period of
8 more than five (5) hours without a meal period of not less than 30 minutes ..." "No
9 employer shall employ" is mandatory and directive language. The remainder of the
10 sentence does not include the "authorize and permit" language, and avoids the ambiguous
11 term "provide."
12

13 A review of the Wage Orders as a whole supports the same conclusion.
14 Employers are to provide meal periods of not less than 30 minutes, the time spent on
15 meal breaks is not "hours worked," and "hours worked" is any time in which an employee
16 is "suffered or permitted to work, whether required to do so or not," Paragraph 2(G). In
17 addition, employers must maintain time records of when meal periods begin and end,
18 Paragraph 7(A)(3), so employers should know if employees are taking their assigned meal
19 breaks, DLSE Manual 45.2.9.1. Reading these sections as a whole suggests that an
20 employer must not knowingly suffer or permit an employee to work during an assigned
21 meal period.
22

23 Third, the Court has been unable to locate any case law directly applicable to
24 determining the elements of a meal break claim. *California Manufacturers Assn. v.*
25 *Industrial Welfare Com.* (1980) 109 Cal. App. 3d 95, 114-115, states that the general
26
27

1 experience of mankind is that it takes 30 minutes to eat a meal, but does not address
2 whether the Wage Orders permit employees to elect voluntarily to eat quickly and return
3 to work in fewer than 30 minutes.

4 Fourth, the DLSE Manual states explicitly that an employer must ensure that its
5 workers take full 30 minute meal breaks. (PX 81.) Section 45.2.1 states, "It is the
6 employer's duty to compel the worker to cease work during the meal period" and "the
7 employer is not entitled to excuse the fact that he or she employs an employee for a
8 period of more than five hours without a meal period on the failure of the employee to
9 take the meal period." The DLSE advisory letter dated September 17, 2001, states that
10 during meal periods "an employer has an affirmative obligation to ensure that workers are
11 relieved of all duty, not performing any work, and free to leave the workplace." (D's
12 RJN, Ex C, p4.) These DLSE documents, although not binding, are informative. *Bell v.*
13 *Farmers Ins. Exch.* (2001) 87 Cal. App. 4th 805, 815.

14 Fifth, the relevant public policy behind meal periods is to provide employees
15 substantial time to relax and the opportunity to nourish themselves in the middle of their
16 work day. *California Manufacturers Assn., supra*, 109 Cal. App. 3d at 114-115
17 (indicating that a 30 minute meal period is one of "the most basic demands of an
18 employee's health and welfare.") The Legislature's decision to enact legislation
19 regarding meal periods but not rest breaks indicates that the Legislature considers meal
20 periods to be of greater importance than rest breaks.

21 The Court concludes that the Labor Code and the Wage Orders require employers
22 to ensure that employees take meal periods of not less than 30 minute. The Wage Orders
23 suggest strongly that every person who works for more than five hours must be offered
24

1 and must take a meal period of not less than 30 minutes. The DLSE Manual and the
2 advisory letter of September 17, 2001, confirm that employers have an affirmative
3 obligation to ensure that workers are relieved of all duty during their meal periods. The
4 importance of meal periods relative to rest breaks is apparent in the Legislature's decision
5 to address meal periods in Labor Code 512.
6

7
8 **COMMONALITY - OTC CLAIMS - POLICIES.**

9 The Court holds that common issues predominate on the OTC claims insofar as
10 those claims concern Wal-Mart's policies and the implementation of those policies.

11 Plaintiffs assert that Wal-Mart had common policies that as uniformly
12 implemented tended to cause associates to work off the clock. Specifically, Plaintiffs
13 assert that Wal-Mart's "New Hire Checklist" states a policy of requiring employees to
14 assist customers at all times (PX 34, 61), its "Labor Guidelines" cause systematic
15 understaffing (PX 10a, PX 11 at 322-324, 337-340, 444-445, 665-670), and its policy of
16 restricting the use of overtime (PX 23, 62, para 3, 4, 8) have a combined effect of
17 requiring Associates to routinely work OTC. Wal-Mart asserts that although it had
18 uniform policies, the managers at its California stores exercised considerable discretion in
19 the implementation of the policies.
20
21

22 The Court finds that Plaintiffs have presented substantial evidence that Wal-Mart
23 had uniform policies of encouraging employees to assist customers at all times, staffing
24 stores according to the "Labor Guidelines," and discouraging overtime work. A review
25 of the written policies presents common issues. A review of how the written policies
26 were implemented in California will also involve common evidence and permit a
27

1 common inquiry into whether Wal-Mart's policy was to encourage associates to work
2 OTC or knowingly permit them to work OTC.

3 If Wal-Mart's policies encouraged or permitted work OTC, the Court could order
4 appropriate injunctive relief to ensure that Wal-Mart complied with the requirements of
5 the Wage Orders.

6 Therefore, the Court finds that common issues predominate on the OTC claims
7 insofar as those claims concern Wal-Mart's policies and the implementation of those
8 policies. The commonality is in the nature of the commonality required under F.R.C.P.
9 23(b)(2) because Wal-Mart "has acted or refused to act on grounds generally applicable to
10 the class, thereby making appropriate final injunctive relief or corresponding declaratory
11 relief with respect to the class as a whole."
12
13

14
15 COMMONALITY - OTC CLAIMS - INDIVIDUAL CLAIMS.

16 The Court holds that common issues do not predominate on the OTC claims
17 insofar as those claims seek monetary relief on behalf of individual associates.

18 The OTC claims require employees to prove that Defendant knowingly permitted
19 them to work and did not pay them for all the time they worked.
20

21 Plaintiffs provide anecdotal and statistical evidence that members of the putative
22 class worked OTC on a routine basis and that Wal-Mart discouraged associates from
23 submitting Time Adjustment Reports (TARs) to ensure that the time records reflected the
24 actual time worked. (PX 62, para 7-10). Wal-Mart asserts that its policy was to require
25 associates to swipe in and out whenever they started and stopped work and that it
26 enforced that policy (PX 74, DX 61). Wal-Mart also asserts that individual issues will
27

1 predominate because any associates who worked OTC could submit TARs to get paid for
2 any unrecorded time and that any OTC claims will necessarily involve not just whether its
3 employees may have worked OTC, but why they did so, why they did not submit TARs,
4 and whether Wal-Mart knew that they had worked OTC.

5 The anecdotal evidence of work OTC offered by Plaintiffs is balanced by
6 anecdotal evidence that Wal-Mart discouraged OTC work, permitted and encouraged
7 employees to submit TARs when they worked OTC, and disciplined the Associates who
8 worked OTC without submitting TARs.

9 The statistical evidence in the Russell Report indicates that 60% of the class
10 members worked OTC at some time in the course of their employment. (PX 48, p8.) The
11 survey does not address the frequency or duration of the OTC work. Taken in the best
12 light, the Russell Report indicates that 60% of the proposed class worked OTC at some
13 time and 40% of the class never worked OTC. Therefore, the Russell Report indicates
14 that of the approximately 50,000 Wal-Mart associates in California, 30,000 worked off
15 the clock at least once in the course of their employment and 20,000 never worked off the
16 clock. (PX 44) This does not support a finding that the proposed putative class members
17 share common claims for OTC work.

18 Therefore, Plaintiffs have not established that common issues predominate
19 regarding the OTC claims for monetary relief.

20 The Court does not reach the issue of whether some or many individual associates
21 may have worked OTC. The Court holds only that Plaintiffs cannot pursue OTC claims
22 and seek monetary relief on behalf of a class of similarly situated associates.

1 COMMONALITY - REST BREAK AND MEAL PERIOD CLAIMS – POLICIES.

2 The Court holds that common issues predominate on the rest break and meal
3 period claims insofar as those claims concern Wal-Mart's policies and the
4 implementation of those policies.

5 Plaintiffs have presented substantial evidence that Wal-Mart has uniform policies
6 regarding rest breaks and meal periods. (PX 2, PX 22, DX 13). A review of the written
7 policies presents common issues.

8
9 Plaintiffs have also presented substantial evidence that there were commonalities
10 in how Wal-Mart's stores in California implemented the rest break and meal period
11 policies. Plaintiffs have presented evidence that Wal-Mart gave uniform directives to its
12 managers and supervisors (PX 22), Wal-Mart had a policy of creating and reviewing
13 records of rest breaks and meal periods, (PX 9c, 20, 21, 22, 23), and Wal-Mart's
14 management monitored in some respects whether employees were taking rest breaks and
15 meal periods (PX 11 at p114-115; 20; 68). This common evidence will permit a common
16 inquiry into whether Wal-Mart's policy as implemented (1) was to authorize and permit
17 employees to take rest breaks of 10 minutes and (2) was to ensure that associates took
18 meal periods of not less than 30 minutes.
19
20

21 The statistical evidence supports the inference that the common policies tended to
22 have a common effect. Regarding rest breaks, the Drogin Report (PX 3A) states that over
23 97% of Associates took rest breaks of less than 15 minutes at some point (Table 1), that
24 45% of the rest breaks were shorter than the 10 minutes permitted by California law
25 (Table 2), and that 66% of the rest breaks were shorter than the 15 minutes permitted by
26 Wal-Mart's policies (Table 2). Regarding meal breaks, the Drogin Report states that
27

1 approximately 90% of Associates took short meal periods at some point (Table 1), that
2 27% of the meal periods were shorter than the 30 minutes permitted by California law
3 (Table 2), and that 64% of the meal periods were shorter than the 60 minute maximum
4 break allowed by Wal-Mart's policies (Table 2).

5 The statistical evidence does not demonstrate that on each day all associates were
6 denied their 10 minute rest breaks and 30 minute meal periods. In fact, the Drogin report
7 states that Wal-Mart associates took the full time permitted by California law on 55% of
8 their rest breaks and on 73% of their meal periods. The statistics do, however, suggest
9 that Wal-Mart's policies had a common effect of causing associates to take short rest
10 breaks and meal periods on a weekly basis. As in *Stephens v. Montgomery Ward* (1987)
11 193 Cal. App. 3d 411, class certification is appropriate where a common policy manifests
12 itself "in the same general fashion" through the organization.
13
14

15 The claims concerning Wal-Mart's policies on rest breaks and meal periods
16 concern the policies, not whether any particular individual took or was denied a break or
17 meal. The trier of fact may determine liability on these class claims without a detailed
18 examination of whether or why any individual associate took a short break or did not
19 receive a 30 minute meal period.
20

21 If Wal-Mart's policies as written or implemented discouraged employees from
22 taking their full rest breaks or routinely failed to ensure that they took their meal breaks,
23 the Court could order appropriate injunctive relief to ensure that Wal-Mart complied with
24 the requirements of the Wage Orders.
25

26 Therefore, the Court finds that common issues predominate on the rest break and
27 meal period claims insofar as those claims concern Wal-Mart's policies and the

1 implementation of those policies. The commonality is in the nature of the commonality
2 required under F.R.C.P. 23(b)(2).
3

4 COMMONALITY - REST BREAK CLAIMS - INDIVIDUAL CLAIMS.

5 The Court holds that common issues do not predominate on the rest break claims
6 insofar as those claims seek monetary relief on behalf of individual associates.
7

8 An individual rest break claim requires an employee to prove that he or she was
9 not truly authorized and permitted to take a rest break. The mere fact that an employee
10 missed or took a short rest break is insufficient to state a claim – an employee must
11 demonstrate that the employer coerced or encouraged the employee to forego their break
12 or take a short break.
13

14 There is no evidence that Wal-Mart had an express policy of discouraging rest
15 breaks. Therefore, whether any given associate was discouraged from taking a rest break
16 will depend on fact specific matters such as the context of the rest break and the content
17 and tone of oral communications from supervisors. This is not a case such as *Vasquez v.*
18 *Superior Court of San Joaquin County* (1971) 4 Cal. 3d 800, 810-811, where the
19 defendant had a script and the Court could assume that the defendant made the same
20 representations to each putative class member. This case is more like *Hamwi v.*
21 *Citination-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 473, where the Court denied
22 certification because resolution of the contract claims would depend on individual
23 discussions the defendant had with substantially all putative class members.
24
25
26
27

1 COMMONALITY - MEAL PERIOD CLAIMS – INDIVIDUAL CLAIMS.

2 The Court holds that common issues predominate on the meal period claims
3 insofar as those claims seek monetary relief on behalf of individual associates.

4 An individual meal period claim requires an employee to prove that he or she did
5 not take a 30 minute meal period. Unlike rest break claims, it is immaterial why an
6 employee did not take a 30 minute meal period. Therefore, there is no need to make
7 individualized determinations as to why any given associate did not receive a 30 minute
8 meal period.
9

10 Wal-Mart had a legal obligation to maintain accurate records, Wage Order, para
11 7(A)(3) and (5), and any determination of damages would necessarily rely in large part on
12 Wal-Mart's time records. Aggregate class wide damages and the damages due to any
13 given class member could be determined based on Wal-Mart's time records. *Acree v.*
14 *General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 396-398. Plaintiffs could
15 assert that the records are accurate or that Wal-Mart is estopped from asserting that they
16 are not accurate. Wal-Mart could assert that its records are inaccurate or inadequate due
17 to measurement error caused by the use (or non-use) of TARs, management edits,
18 employee errors, employee fraud, and otherwise. (DX 8, Switzer Dec, p 7-9 discussing
19 measurement error.) The trier of fact could determine whether the records are sufficiently
20 accurate to support an award of damages and, if so, the amount of damages. *Anderson v.*
21 *Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687-688; *Hernandez v. Mendoza* (1988)
22 199 Cal. App. 3d 721, 726-727. The Court expresses no opinion as to whether Wal-
23 Mart's time records accurately report the meal periods taken by each associate, only that
24 the issue is common to all class members.
25
26
27

1 Variations among the damages that might be awarded to individual class members
2 would not preclude class certification. A class action can be maintained even if each
3 class member will at some point individually show his or her eligibility for recovery or
4 the amount of his or her damages. *Acree, supra*, 92 Cal.App.4th at 401.

5
6
7 COMMON QUESTIONS OF LAW.

8 Plaintiffs' theories of recovery fall into four categories: (1) Labor Code claims; (2)
9 contract claims based on the employee handbook, implied contracts, and the contractual
10 duty of good faith and fair dealing; (3) a claim under the Unfair Competition Law,
11 Business and Professions Code 17200 ("UCL"); and (4) equitable claims based on unjust
12 enrichment and conversion.

13
14 Contract claims (Causes of action 1-4, 8). Common issues do not predominate on
15 the claims for breach of written contract (the Employee Handbook), breach of an implied
16 contract, and breach of the implied contractual duty of good faith and fair dealing. The
17 claim for breach of written contract is individualized because Associates sign
18 acknowledgements that the Employee Handbook is not a contract (DX 9, 15), so
19 individual testimony would be necessary to determine whether any given Associate was
20 told or lead to believe that it was an enforceable contract. *Hamwi, supra*, 72 Cal.App.3d
21 at 473 (common contract held not basis for class certification). The claim for breach of
22 implied contract is also individualized. The nature of an implied contract is that it is not
23 written, and therefore specific determinations must be made based on what the parties to
24 the implied contract said, heard, performed, or communicated. The claim for breach of
25 an implied term in a written or implied contract is even more individualized. See *Guz v.*
26
27

1 *Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 339-340 (parol evidence is admissible to
2 explain, supplement, or even contradict the terms of an employee handbook); *Wal-Mart*
3 *Stores, Inc. v. Lopez* (Tex. App. 2002) 93 S.W.3d 548 (class not certified to pursue
4 OTC/short-break claims because individual issues of contractual formation and breach
5 predominated over common issues); *Petty v. Wal-Mart Stores, Inc.* (Ohio App. 2002) 773
6 N.E.2d 576, *rev. denied*, 772 N.E.2d 1203 (class not certified to pursue OTC/short-break
7 claims arising under "policies and oral agreements")' *Basco v. Wal-Mart Stores, Inc.*
8 (E.D. La 2002) 216 F. Supp.2d 592 (rejecting class certification for OTC/short-break
9 claims under contract and unjust enrichment theories)
10

11 Labor Code claims (Causes of action 5, 9-11). Common issues predominate in
12 the Labor Code claims because the Labor Code affects Wal-Mart uniformly and each
13 associate identically.
14

15 Equitable claims (Causes of action 6-7). Common issues do not predominate on
16 the equitable theories of unjust enrichment and conversion. A review of the equitable
17 considerations will require an inquiry into the specifics of each employee's knowledge,
18 expectations, and situation. For example, an employee may waive or compromise his or
19 her equitable claims through action or inaction. This is in contrast to the Labor Code
20 claims, which may not be waived. Labor Code 219.
21

22 UCL Claim (Cause of action 13). Class certification is determined with reference
23 to each claim asserted, and must take into account whether a class is appropriate for each
24 claim. *Hicks, supra*, 89 Cal.App.4th at 916 fn 22. This can be daunting when a plaintiff
25 seeks to certify a claim under the UCL.
26
27

1 Certifying a class to pursue a claim under the UCL presents many of the same
2 challenges as determining the statute of limitations under the Unruh Act. In *Gatto v.*
3 *County of Sonoma* (2002) 98 Cal.App.4th 744, 754-760, the Court held that although the
4 Unruh Act comprises *only* Civil Code section 51, all Unruh Act claims are not subject to
5 the same statute of limitations. The Court noted that the Unruh Act "is increasingly
6 treated as an omnibus anti-discrimination statute no longer limited to merely ensuring
7 equal access to accommodations," that Courts should not assume that all Unruh Act
8 claims are subject to the same statute of limitations, and that such an assumption "fails to
9 attend to the complexity of the Unruh Act and the variety of claims that may be
10 adjudicated under its rubric." The Court concluded that no single statute of limitations
11 applies to all claims under the Unruh Act and that the nature of the claim will determine
12 the applicable limitations period. Similarly, although the UCL is a single statute all UCL
13 claims should not be treated equally. The statute is complex, and a variety of claims may
14 be adjudicated under its rubric. Common issues may predominate for some claims and
15 not for others.

16
17
18 A claim under the UCL may allege unlawful, unfair, or fraudulent business
19 practices and there is a separate jurisprudence for each prong of the UCL. The unlawful
20 prong borrows from any "law, be it civil or criminal, federal, state, or municipal,
21 statutory, regulatory, or court-made," *Wang v. Massey Chevrolet* (2002) 97 Cal. App. 4th
22 856, 871; the unfair prong rests on policies that "must be "tethered" to specific
23 constitutional, statutory or regulatory provisions," *Gregory v. Albertson's, Inc.* (2002) 104
24 Cal. App. 4th 845, 854; and the fraudulent prong concerns the probable effects of
25 statements on hypothetical "reasonable consumers," *Lavie v. Procter & Gamble Co.*
26
27

1 (2003) 105 Cal. App. 4th 496, 506-507 Therefore, a plaintiff must clarify whether a
2 UCL claim alleges an unlawful, unfair, or fraudulent business practice.

3 Insofar as a UCL claim alleges an unlawful or unfair business practice, a plaintiff
4 must identify with particularity the state and federal statutes that support those claims.

5 The Court will not certify a UCL "unlawful" or "unfair" claim that purports to borrow or
6 rest on unspecified statutes or common law rules. This differentiation is required because
7 common issues may predominate with regard to UCL claims based on one statute but not
8 on another. In addition, a class of persons asserting generalized claims of unlawfulness
9 or unfairness is an invitation to problems regarding the res judicata effect of any
10 judgment. *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649, 671 (judgments in
11 UCL actions that have been certified as class actions are binding on absent class
12 members).
13

14 Finally, a plaintiff must identify the "business practice" at issue with some
15 specificity. Common issues may predominate with regard to one business practice but
16 not another.
17

18 For these reasons, the Court will not certify a class to pursue an undefined UCL
19 claim.
20

21 The Court will certify UCL unlawful and unfair claims that overlay the certified
22 Labor Code claims. The Court will not certify those UCL unlawful and unfair claims that
23 overlay the claims that are not otherwise certified.
24

25 The Court will certify the UCL fraudulent claim regarding OTC work, rest breaks,
26 and meal periods based on representations made in the Handbook. The Handbook is a
27 uniform document that meets the commonality requirement and Plaintiffs have identified

1 the following specific representations in the Handbook that they allege to be fraudulent:

2 (1) "we want to pay you for this work" (PX 2 and DX 11 at p25); (2) "Associates will be
3 provided break and meal periods during their scheduled work shift" (PX 2 and DX 11 at
4 p26); (3) "No associate should work over six hours without taking at least a 30 minute
5 meal period" (PX 2 and DX 11 at p 26); and (4) Wal-Mart will provide rest breaks (PX 2
6 and DX 11 at p 26; DX 13). (P Supp Brief at 11:9-20.) Differences in how individual
7 associates interpreted the Handbook are irrelevant to the UCL fraudulent claim because
8 the claim concerns the effect on a "reasonable employee," not the effect on the actual
9 class members. *Lavie v. Procter & Gamble Co.* (2003) 105 Cal. App. 4th 496, 506-507.
10
11

12 TYPICALITY OF REPRESENTATION.
13

14 Plaintiffs' claims are sufficiently typical of the common claims presented. A class
15 representative's claims need not be identical to the claims of other class members and it is
16 only required that the representative be similarly situated so that he or she will have the
17 motive to litigate on behalf of all class members. *Classen v. Weller* (1983) 145
18 Cal.App.3d 47, 46. The named plaintiffs are sufficiently typical to represent the class.
19
20

21 ADEQUACY OF REPRESENTATION.
22

23 Wal-Mart presents evidence that Wal-Mart terminated the employment of
24 Plaintiffs Savaglio and Newland for cause. The reasons for their termination do not
25 concern directly whether they worked OTC or did not receive rest breaks or meal periods.
26 The Court holds that Savaglio, Newland, and Davis are adequate class representatives.
27

1 The named Plaintiffs have demonstrated that they will aggressively and competently
2 assert the interests of the class and that they have retained competent counsel.
3

4 POLICY CONSIDERATIONS.

5 The Court may consider whether a class action is a superior to individual claims
6 and the suitability of alternative procedures for handling the controversy. *Basurco*, 108
7 Cal. App. 4th at 120-122; *Caro*, 18 Cal. App. 4th at 660-662.
8

9 The UCL is a suitable alternative procedure for handling the claims insofar as they
10 concern Wal-Mart's policies and the implementation of those policies. The pending UCL
11 claim permits plaintiffs to stand in the shoes of the general public (like the DLSE) and to
12 obtain injunctive and declaratory relief to address an unlawful business practice (as in
13 class actions under F.R.C.P. 23(b)(2)). To the extent this case concerns the propriety of
14 Wal-Mart's business practices, the UCL claim is an effective alternative to certifying a
15 class to pursue injunctive and declaratory relief regarding those business practices. (A
16 representative UCL claim is arguably a superior alternative because it offers a streamlined
17 procedure.) The Court is, however, reluctant to deny class certification on the basis that
18 the UCL is an effective alternative given that representative UCL claims can themselves
19 proceed as class claims. *Corbett v. Superior Court* (2002) 101 Cal. App. 4th 649. The
20 better course is to certify the UCL claim as an injunction and declaratory relief class
21 similar to a class under F.R.C.P. 23(b)(2).
22

23 An investigation by the DLSE is another alternative procedure, and the DLSE has
24 initiated an investigation into Wal-Mart's timekeeping practices. (DSuppX 19.) The
25 DLSE investigation is at its early stages, so there would be a substantial delay in
26
27

1 resolving the claims of absent class members if the Court were to defer to the DLSE. In
2 addition, Plaintiffs presented the Court with a letter from the DLSE to counsel for
3 Plaintiff dated September 12, 2003, stating, "[I]t would make little sense for us to
4 continue to investigate Wal-Mart's meal period practices in the face of the class action
5 that your firm is litigating over these same issues. Indeed, we believe that this class
6 action now offers the best vehicle for vindicating the rights of Wal-Mart's employees.
7 Therefore, you may represent to the court in your action that DLSE has concluded that it
8 will stay its investigation of Wal-Mart's meal practice practices, and that we do not
9 anticipate resuming our investigation unless class certification is denied." (Grant Dec.
10 filed 9/15/03, Exh A.) Therefore, the Court will not deny class certification based on the
11 pending administrative investigation. .
12
13

14 Individual claimants may pursue individual wage claims through an
15 administrative process under California Labor Code 98. The administrative process is
16 "designed to provide a speedy, informal, and affordable method of resolving wage
17 claims" and "to avoid recourse to costly and time-consuming judicial proceedings in all
18 but the most complex of wage claims." *Post v. Palo/Haklar & Associates* (2000) 23
19 Cal.4th 942, 947. The administrative process is not, however, an exclusive remedy. *Id.* at
20 946. The Court holds that the class approach is a superior means to address policies and
21 practices that may cause consistent denials of rest breaks and meal periods. The
22 administrative process is a better means to address the OTC and rest break claims of
23 individuals.
24
25

26 ///

27 ///

1
2 CLASS DEFINITION

3 The Court certifies four overlapping classes to pursue the four categories of class
4 claims. The classes are (1) an "OTC Class" to pursue the Labor Code and UCL unlawful,
5 unfair, and fraudulent claims regarding Wal-Mart's OTC policies and to seek injunctive
6 and declaratory relief; (2) a "Rest Break Class" to pursue the Labor Code and UCL
7 unlawful, unfair, and fraudulent claims regarding Wal-Mart's rest break policies and to
8 seek injunctive and declaratory relief; (3) a "Meal Period Class" to pursue the Labor Code
9 and UCL unlawful, unfair, and fraudulent claims regarding Wal-Mart's meal period
10 policies and to seek injunctive and declaratory relief; and (4) a "Meal Period Money
11 Class" to pursue the Labor Code and UCL unlawful, unfair, and fraudulent claims
12 regarding whether associates were denied meal periods and to seek monetary relief.
13
14

15 All four classes are defined as follows: "All current and former hourly employees
16 of Wal-Mart Stores, Inc. (including Wal-Mart Stores and Supercenters) in the state of
17 California from February 6, 1997, through the date judgment is entered in this action,
18 excluding all employees who hold or held the following positions during the Class
19 Period: salaried manager, customer service manager, pharmacist, and/or personnel
20 manager."
21
22

23 EVIDENCE

24 Except as stated otherwise, all evidentiary objections by the parties are
25
26 OVERRULED. The Court notes, however, that its consideration of the evidence is
27

1 limited to the motion for class certification only and should not be construed as an
2 indication of admissibility in future motions or at trial.
3

4 ISSUES NOT REACHED

5 Consistent with *Linder*, 23 Cal.4th at 439-40, the Court does not address the merits
6 issues raised in the briefing, including (1) whether individual losses of de minimus break
7 time that might not support individual claims can be aggregated and support a class
8 claim; and (2) whether there is a private right of action under Labor Code 226.7. The
9 Court likewise does not address the remedies issues raised in the briefing, including (1)
10 whether an employee can recover compensation for a short rest break given that rest
11 break time is paid time; (2) whether an employee can recover compensation for a short
12 meal period given that employees start receiving pay when their meal periods conclude;
13 (3) whether paragraph 11 of the Wage Orders require payment for the entire meal period
14 when meal periods are interrupted or just when an employee is "on-duty" during an entire
15 meal period.
16
17
18

19
20 FURTHER PROCEEDINGS

21 The Court sets a case management conference for November 21, 2003, at 2:00
22 p.m. At the case management conference the parties should be prepared to discuss the
23 necessity of providing class notice, the mechanics and form of any such notice, and
24 whether a formal motion on class notice will be required. C.R.C. 1856. The OTC Class,
25 the Rest Break Class, and the Meal Period Class are certified to seek injunctive and
26 declaratory relief only, so the Court is inclined to order that it is not necessary to provide
27

1 class members with notice and an opportunity to opt out of the class. C.R.C. 1856(b)(1)
2 and (2) and (c)(1) and (2). See also *Frazier v. City of Richmond* (1986) 184 Cal. App. 3d
3 1491, 1500-1501. The Meal Period Money Class is certified to seek monetary relief, so
4 the Court is inclined to order notice and provide absent class members an opportunity to
5 opt out. *Bell v. American Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1609, suggests
6 that this procedure may be appropriate.
7

8 At the case management conference the parties should also be prepared to discuss
9 (1) whether either side intends to seek writ relief from the class certification order; (2) the
10 nature, scope, and length of time expected to complete any merits related discovery; (3)
11 further motion practice; (4) mediation and settlement possibilities; and (5) setting a trial
12 date.
13

14 Prior to trial, the Court will require Plaintiffs to present a plan on how the case
15 will be tried. The burden rests with Plaintiffs to present a manageable trial plan.
16 *Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 924-925. Defendant
17 will have the opportunity to present the Court with its concerns and offer a competing
18 trial plan. The Court's goal will be to proceed to trial in a manner that will protect the
19 due process rights of Defendant and the absent class members, be comprehensible to the
20 jurors, and respect the time of the jurors.
21

22 The Court also encourages Plaintiffs to consider the nature and scope of the
23 injunctive relief they seek. If Plaintiffs were to prevail on liability, Plaintiffs must
24 propose injunctive relief that is consistent with the proper role of the Court. *Diaz v. Kay-*
25 *Dix Ranch* (1970) 9 Cal.App.3d 588, 599 (dismissing claim for injunctive relief because
26 the remedy sought was impracticable and alternative enforcement means were available);
27

1 Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group
2 2003) § 9:541 (discussing judicial tendency to avoid injunctions that require continuing
3 judicial supervision). Absent compelling circumstances, the Court is not likely to assume
4 ongoing supervision of Wal-Mart's staffing, scheduling, timekeeping, and payroll
5 operations.
6

7
8 Dated 11/6/03


Judge of the Superior Court

(RCD-11/00)

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served a copy of this Order by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States Mail at Alameda County, California, following standard court practices.

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Dated: November 7, 2003

ARTHUR SIMS
Executive Officer/Clerk of the Superior Court

By Charlotte Marin
Charlotte Marin, Clerk of Dept. 22

EXHIBIT F

LEXSEE 2006 US DIST LEXIS 22546

KEN SMITH, Plaintiff, v. HEARST COMMUNICATIONS, INC., Defendant.**No. C-06-00254 EDL****UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA****2006 U.S. Dist. LEXIS 22546****April 13, 2006, Decided****April 13, 2006, Filed**

COUNSEL: [*1] For Ken Smith, Plaintiff: Richard J. Vaznaugh, Law Offices of Richard J. Vaznaugh, San Francisco, CA.

For Hearst Communications Inc. doing business as San Francisco Chronicle doing business as SFGate.com, Defendant: Baldwin J. Lee, Lindbergh Porter, Jr., Allen Matkins Leck Gamble & Mallory LLP, San Francisco, CA.

JUDGES: ELIZABETH D. LAPORTE, United States Magistrate Judge.

OPINION BY: ELIZABETH D. LAPORTE

OPINION**ORDER GRANTING PLAINTIFF'S MOTION FOR
REMAND TO STATE COURT AND DENYING
PLAINTIFF'S MOTION FOR ATTORNEYS' FEES****I. INTRODUCTION**

Defendant Hearst Communications, Inc. removed this case on the ground that Plaintiff Ken Smith's claims were completely preempted by section 301 of the National Labor Relations Act ("Section 301"). 29 U.S.C. § 185(a). However, because Smith's claims are grounded in non-waivable rights arising under the California Labor Code, they are not preempted.

II. FACTUAL BACKGROUND

Smith was an account executive at SFGate, a subsidiary of Hearst Communications, Inc. See Notice of Removal, Ex. C (Memorandum of Understanding ("MOU")) at 1. As an account executive, he solicited new advertising business for SFGate. [*2] Id. at 7. His position was covered by the Collective Bargaining

Agreement ("CBA") negotiated between his union and Hearst. Id. at 1, 4, 7. When Smith decided to relocate to Arizona in May 2004, he allegedly negotiated a separation agreement whereby Hearst agreed to pay him commissions on all business that Smith booked through his last day of work as long as those advertisements ran within three months of his departure. Smith's manager allegedly assured him that he would receive this three month "tail" both verbally and in writing. Smith continued to make sales until his last day of work. Without the tail, Smith would have had no incentive to keep working, because he was working on a commission-only compensation basis.

After Smith resigned, Hearst refused to pay tails on Smith's two biggest accounts, Google, Inc. and Intercept Interactive (the "Disputed Accounts"). After his union and the NLRB declined to pursue his grievances, Smith sued his former employer in Superior Court. Smith's complaint alleged only violations of California Labor Code section 200 *et seq.*, specifically sections 202 (wages payable upon resignation), 203 (waiting time penalties), [*3] 218.5 (attorneys' fees and costs), 218.6 (interest), and of California Business & Professions Code section 17200, *et seq.* (unfair competition). Hearst removed the case on the basis that Smith's state-law claims were preempted by Section 301 of the National Labor Relations Act because they all arose out of the CBA. Smith then filed a motion to remand and for attorneys' fees.

III. DISCUSSION**A. Removal Jurisdiction and the Complete Preemption Doctrine.**

Where a civil action over which the federal courts have original jurisdiction is brought in state court, the defendant may remove the action to federal district court.

See 28 U.S.C. § 1441. A case may be removed pursuant to 28 U.S.C. section 1441 only where a federal question appears on the face of the properly pleaded complaint. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). The Ninth Circuit has consistently held that 28 U.S.C. section 1441 is to be strictly construed against removal jurisdiction, and that "[f]ederal jurisdiction must be rejected if there is any doubt as to the right [*4] of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979)). On its face, the complaint, which asserts state law claims only, does not provide any ground for removal. Hearst argues, however, that the claims are artfully pled and are in fact claims for breach of the CBA, triggering preemption by Section 301 of the National Labor Relations Act. Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a). Accordingly, the only ground for federal jurisdiction arises out of Hearst's construction of Smith's claims, and its anticipated defenses.

Normally, a defendant may not rely on an affirmative defense to establish preemption and removal jurisdiction. See *Caterpillar*, 482 U.S. at 393 ("[I]t [*5] is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." (citing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 12, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983))); see also *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 809, n.6, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."). Nevertheless, in the area of labor relations and collective bargaining, "the preemptive force of a statute is so extraordinary' that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)); see also *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1472-73 (9th Cir. 1984) (courts must look behind artful pleading and ascertain whether state claim is [*6] really a Section 301 claim in disguise). This "complete preemption" doctrine "is applied primarily in cases raising claims preempted by § 301" of the Labor Management Relations Act. *Caterpillar*, 482 U.S. at 393. Where the heart of a state-law

complaint is a violation of a CBA, that complaint arises under federal law, whether or not the plaintiff has mentioned the CBA. *Id.* at 394 ("[T]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." (quoting *Franchise Tax Bd.*, 463 U.S. at 23))). Preemption also applies if the state claims are "substantially dependent on analysis" of the CBA. *Caterpillar*, 482 U.S. at 394 (quoting *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859, n.3, 107 S. Ct. 2161, 95 L. Ed. 2d 791 (1987)).

By contrast, state law claims that are independent from the CBA or that only require a court to refer to or consult a CBA are not preempted. See [*7] *Caterpillar*, 482 U.S. at 399 ("But a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. . . . Congress has long since decided that federal defenses do not provide a basis for removal."); *Livadas v. Bradshaw*, 512 U.S. 107, 124-25, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994) ("simple need to refer" to a CBA does not trigger Section 301 preemption); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 410-13, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1998) (CBA can provide helpful terms in state law action without triggering preemption).

B. Smith's Claims Are Not Completely Preempted by Section 301 of the NLRA.

Hearst mistakenly argues that Smith's claims are arise from the CBA, or at least would require a state court to analyze the CBA and as such are completely preempted.

1. Smith's Claims Are Based on Non-Negotiable State Rights, not on Contract Law.

The Ninth Circuit has made clear that the rights Smith invokes under the Labor Code are "non-negotiable" and could not have been bargained away by Smith's union. See *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076, 1082 (9th Cir. 2005) [*8] (holding that employees' California state law claim regarding unlawful meal period policy of their employer was not preempted because employees had based their claim on California state law, "without any reference to expectations or duties created by their" CBA); see also *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir. 1993) ("[C]auses of action which assert nonnegotiable state-law rights . . . independent of any right established by contract" are not preempted by Section 301.); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d

1102, 1111 n.3 (9th Cir. 2000) (Section "301 does not permit parties to waive, in a [CBA], nonnegotiable state rights."). Because Smith pled only claims under state statutes governing basic workplace rights rather than a claim for breach of an employment contract, this case differs from both *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), and *Olguin*, 740 F.2d 1468. In *Young*, the court held that the plaintiff's claim for breach of contract based on an oral promise by her employer to discharge her only for cause was preempted by Section 301 [*9] because the plaintiff's position was covered by a CBA (which allowed the employer to discharge probationary employees like plaintiff without cause). See *Young*, 830 F.2d at 996. In *Olguin*, 740 F.2d at 1474, the court similarly held that an employee's claim for breach of contract based on a personnel policy manual requiring the use of "progressive discipline" before termination of an employee was preempted because a CBA existed between the employee's union and his employer. By contrast, Smith did not file a breach of contract claim, but instead sought to vindicate rights protected by the California Labor Code.¹

1 Hearst emphasizes that Smith, in complaining to the NLRB, made a sworn statement that his employer "in violation of the [CBA]" failed to pay his commissions. See Notice of Removal, Ex. D. According to Hearst, this statement constitutes a binding admission by Smith that his claims arise under the CBA and contradicts the declaration that he filed in support of his motion to remand. See Opp'n at 5-6. This argument is not persuasive. First, Smith states that he made the earlier declaration based on the NLRB's instructions and that he, as a non-lawyer, was not qualified to determine what rights had been violated or what those rights arose under. See Smith Decl. PP 2-4. Second, the original declaration did not state that his claim for commissions arose *solely* under the CBA. Third, the case upon which Hearst relies, *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999), is inapposite. There, the plaintiff had previously filed a declaration stating that she was unable to work in support of her application for Social Security Disability Income benefits. She then sued her employer for disability discrimination. The employer moved for summary judgment, arguing that the plaintiff could not meet one of the elements of her case since she had sworn that she was unable to work. The plaintiff failed to explain the discrepancy between her earlier statement and her position opposing summary judgment. The court held that: "When faced with a plaintiff's previous sworn

statement asserting total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an [Americans with Disabilities Act] claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless perform the essential functions' of her job, with or without reasonable accommodation.'" Id. at 807. Smith's earlier declaration does not rise to the same level of definitiveness as the declaration in *Cleveland*, and he has provided a sufficient explanation for the discrepancy.

[*10] Hearst argues that Smith's claims nonetheless are preempted because Labor Code section 203 only applies to situations where an employer *willfully* fails to pay wages owed, and that whether or not Hearst's decision not to pay was willful can be determined only by reference to the CBA. See Opp'n at 11. As explained below, resolving this issue will not require the type of analysis that is prohibited by Section 301. At the hearing, Hearst also argued that the uncertainty of what amount was owed to Smith distinguished *Balcorta*, 208 F.3d 1102 and *Ramirez*, 998 F.2d 743. However, Hearst did not provide any authority for the proposition that the California Legislature intended to limit "non-negotiable" rights to those situations where the amount of the payment owed was already determined. Smith did not allege a breach of contract, and Hearst cannot invoke federal jurisdiction by redrafting the claims that Smith has pleaded.

2. Smith's Claims Do Not Require a State Court to Interpret the CBA.

The CBA and the MOU governed the terms of Smith's employment. See Notice of Removal, Exs. B (CBA)-C (MOU). Section 4 of the MOU specifically allowed Hearst [*11] to have a percentage of its sales staff on a commission-only compensation basis, exempted such employees from Article XX of the CBA, and specified that the employer "shall determine the commission structure" for SFGate commissions-only employees like Smith Id., Ex. C § 4 P 9. By amendment, the MOU clarified that:

Commission sales employees shall be permitted to solicit only new advertising business; defined as . . . advertising accounts which have not been active in the Chronicle for 13 months and . . . advertising accounts which have run other paid advertising in print or direct mail in our market and have not been active in the

Chronicle for 6 months. . . . Once a new account becomes regular, it shall be turned over to a member of the salaried sales staff who shall continue to service the account. A new account becomes "regular" after it has placed advertisements in each of 12 consecutive months within a 14 month period. . . . The Employer shall determine the commission structure.

Id., Am. at 7. The MOU accordingly provides readily calculable, time-based definitions of "new" accounts for which account executives are entitled to commissions, and of [*12] "regular" accounts for which they are not.

Because the CBA gave it the right to set the commission structure, including percentage and qualifying accounts, Hearst argues that Smith's claims under the Labor Code for unpaid commissions will require a court to analyze terms of the CBA in a manner prohibited by Section 301. See *Caterpillar*, 482 U.S. at 394; see also *Young*, 830 F.2d at 997. Unlike the collateral agreements at issue in *Young* and *Olguin*, however, Smith's alleged collateral agreement only supplements terms that are entirely missing from the CBA. See MOU; see also March 14, 2006 Declaration of Linda Frediani ("Frediani Decl.") P 3 ("[C]ommissioned-only salespeople like Mr. Smith worked under commission arrangements that were established between them and the company outside the CBA. Typically, the Guild was not involved in setting these commission agreements and this was true in Mr. Smith's case, as well. To my knowledge, nothing in the CBA in 2004 prevented the Company from negotiating a separate agreement for commissions of the type Mr. Smith told me about. Indeed, there had to be separate agreements between the company [*13] and its salespeople because no commission plans were included in the CBA."). ² The complaint therefore only implicates the CBA to the extent that Hearst will defend its refusal to pay commissions by claiming that the Disputed Accounts were "regular" accounts (a term defined in the CBA) for which Smith was not entitled to any commissions.

² Ms. Frediani submitted two declarations in connection with this motion. The first declaration was filed in support of Plaintiff's motion for remand; the second was filed late in support of Hearst's opposition. As the Court noted at the hearing, the declarations conflicted. The Court ordered the parties to make Ms. Frediani available at the hearing, but her attorney was unable to appear on such short notice.

Determining whether this defense is valid will not require a state court to analyze the CBA in a prohibited manner. That a court will eventually look to Amended paragraph 9(3) of the MOU to find the definition of a "regular" account versus a "new" account does not mean [*14] that the court will have to interpret the CBA. With the definition in hand, the court will only have to consult a calendar and accounting records to determine whether the Disputed Accounts had placed advertisements in the Chronicle for the thirteen months prior to Smith's resignation. Smith's claims therefore are not completely preempted by Section 301. See *Livadas*, 512 U.S. at 124 ("[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." (citing *Lingle*, 486 U.S. at 413 n.12 ("A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled."))).

For example, in *Ramirez*, the Ninth Circuit refused to extend Section 301 preemption to cases that only involved a reference to or consideration of a clause in a CBA:

Fox errs in equating "reference" with "interpret." The resolution of *Ramirez*'s action will not require the interpretation [*15] of the Bargaining Agreement. The Bargaining Agreement will likely be referred to by *Ramirez* and Fox to determine the terms and conditions of her employment. But her underlying cause of action is that Fox discriminated against her in applying and/or altering those terms and conditions. Although the inquiry may begin with the Bargaining Agreement, it certainly will not end there. . . . reference to or consideration of the terms of a collective-bargaining agreement is not the equivalent of interpreting the meaning of the terms. . . . Although the line between reference to and interpretation of an agreement may be somewhat hazy, merely referring to an agreement does not threaten the goal that prompted preemption -- the desire for uniform interpretation of labor contract terms.

998 F.2d at 748-749 (citing *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962)). Similarly, in *Balcorta*, the Ninth Circuit explained that: "[w]e have stressed that, in the

context of § 301 complete preemption, the term interpret' is defined narrowly -- it means something more than consider,' refer to,' or apply.'" 208 F.3d at 1108 (quoting [*16] Associated Builders & Contractors, Inc. v. Local 302 Int'l Bhd. of Elec. Workers, 109 F.3d 1353, 1357 (9th Cir. 1997)). The court accordingly affirmed the denial of summary judgment on preemption grounds, holding that it was not necessary to interpret the terms of the CBA to decide what constituted a "discharge" or "timely payment of wages" for purposes of plaintiff's claim:

Although the provisions [of the CBA] do detail fairly complicated procedures and contain a hefty dose of industry jargon, their meaning is neither uncertain nor ambiguous. A court may be required to read and apply these provisions in order to determine whether an employee was discharged from his "call" at the end of his shift, but no interpretation of the provisions would be necessary. . . . We have difficulty understanding why Fox thinks this straightforward language requires interpretation. . . .

Balcorta, 208 F.3d at 1109-10. The CBA terms that Hearst will rely on to defend against Smith's claims will be those defining "regular" accounts and "new" accounts. See Notice of Removal, Ex. C (MOU) at 7. These unambiguous provisions use similarly "straightforward [*17] language" that does not require interpretation.

Finally, because the Court has determined that Smith is suing to enforce non-negotiable state rights, which do not trigger Section 301 preemption, the Court need not reach Plaintiff's alternate argument based on *Price v. Georgia-Pacific Corp.*, 99 F. Supp. 2d 1162 (N.D. Cal. 2000). C. Motion for Attorney's Fees.

Absent unusual circumstances, court usually award attorneys' fees under 28 U.S.C. section 1447(c) only if the removing party "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 126 S. Ct. 704, 711, 163 L. Ed. 2d 547 (2005). As the Ninth Circuit has stated, "[l]abor preemption is a complex and confused area of the law." *Olguin*, 740 F.2d at 1473. Hearst removed the case based on the "objectively reasonable basis" that Smith's claims were completely preempted, and the Court does not find any "unusual circumstances" that warrant fee shifting.

IV. CONCLUSION

For the reasons stated above, pursuant to 28 U.S.C. § 1447(c), the Court remands the case to the Superior Court and denies Smith's motion for [*18] attorneys' fees.

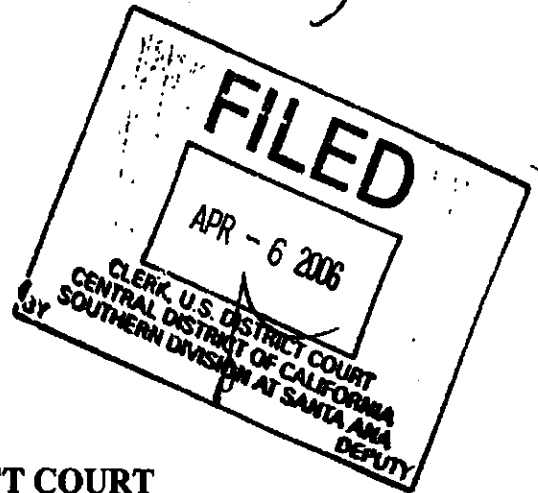
IT IS SO ORDERED.

Dated: April 13, 2006

ELIZABETH D. LAPORTE

United States Magistrate Judge

EXHIBIT G



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JAMES STEVENS, an individual
and on behalf of all others similarly
situated,

Plaintiff,

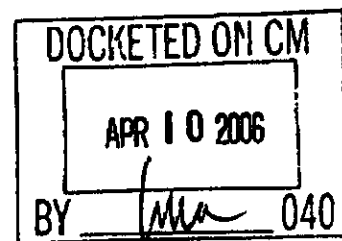
v.

GCS SERVICE, INC., a Delaware
corporation; ECOLAB INC., a
Delaware corporation, and DOES 1
through 200, inclusive,

Defendants.

CASE NO.: SACV 04-1337 CJC (CTx)

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION
FOR CLASS CERTIFICATION



Plaintiff James Stevens asserts claims for unpaid overtime and meal and rest period violations on behalf of himself and a putative class of current and former employees of Defendant GCS Service, Inc., a kitchen equipment repair company. Before the Court are (1) GCS's motion for summary judgment on Mr. Stevens' individual claims, and (2) Mr. Stevens' motion for class certification. Because the undisputed evidence shows that Mr. Stevens is not entitled to compensation for his commuting time to and from work, partial summary judgment for GCS is GRANTED as to Mr. Stevens' overtime claim. However, partial summary

65

1 judgment is DENIED as to his meal and rest break claims because he presents
2 evidence that GCS discouraged him from taking the breaks and imposed
3 productivity demands that did not permit them. Finally, because Mr. Stevens has
4 not met his burden to show that the meal and rest break claims are appropriate for
5 class certification pursuant to Federal Rule of Civil Procedure 23(b)(2) or (b)(3),
6 his motion for class certification is DENIED.

7
8 **I. Background**

9
10 GCS Service, Inc. ("GCS") provides repair services for commercial kitchen
11 appliances across the nation. (Bogen Depo., 16:24-27:3.) Mr. Stevens worked as
12 a service technician for GCS in Los Angeles from October 1992 until he quit his
13 job in June or July 2004, with a brief hiatus between April 2001 and February
14 2002. (Plaintiff's Statement of Genuine Issues, "SGI," Nos. 1, 4.) While he
15 worked for GCS, Mr. Stevens repaired and maintained cooking and food
16 preparation equipment for restaurants, hospitals, and nursing homes. (SGI No. 2;
17 Stevens Depo. 25:17-24.)

18
19 GCS technicians have no fixed job site. (SGI Nos. 3, 6, 8; Stevens Depo.
20 78:44-12.) Instead, they drive to customers' locations in vans owned and provided
21 by GCS, which contain tools used in the repair jobs. (SGI Nos. 3, 6, 8; Stevens
22 Depo. 78:44-12.) GCS pays for fuel and maintenance for the vans, and charges
23 each customer a flat "trip charge" to cover those costs. (Bogen Depo., 8-24;
24 Motion for Summary Judgment, p.10 n.5; Lenarz Depo., 22:2-19.) Before 2002,
25 GCS charged each customer for the actual amount of the technician's travel time
26 to the site. (Pelaske Decl., ¶ 8.) Technicians are required to use the vans, and may
27 not drive their personal vehicles to job sites. (Lenarz Decl., ¶ 5; Pelaske Decl., ¶
28 5.) Tzannakos Decl., ¶ 5.) The vans have stickers displaying an (800) number,

1 that allow other drivers to report the technicians' driving habits to GCS. (Stevens
2 Decl., ¶5.) If GCS receives too many complaints about a technician's driving
3 habits within a specific time period, the technician may be fired. (*Id.*; Exh. C to
4 Stevens Decl., at 5.) All service technicians are required to undergo a successful
5 completion of a Motor Vehicle Record check and drug test before they are hired.
6 (Exh. A to Stevens Decl.)

7
8 Technicians spend their days driving GCS' vans between jobs. In the
9 morning, they drive the vans from their homes to the first job site, and in the
10 evening they drive the vans from the last job site back to their homes. (Stevens
11 Depo. 60:16-61:16.) They are required to call dispatchers several times a day to
12 communicate their locations and movements, receive new assignments, and update
13 the dispatchers on the status of their work. (*Id.*, 71:3-19; Bogen Depo., 62:22-
14 63:1.)

15
16 Technicians differ in the timing of their first and last calls of the day to the
17 dispatcher, and in the activities they perform on the way to their first job and home
18 from their last job. Mr. Stevens typically would make his first call of the day to
19 the dispatcher after he had arrived at his first job site, and would learn the location
20 of the first job site for the following day in the evening, when he called at the end
21 of his last job before going home. (Stevens Depo., 131:2-25.) However, a current
22 GCS technician named Michael Lenarz states that he typically makes his final call
23 after arriving home in the evening, and then makes an additional call to GCS'
24 parts center to tell it what parts have been used during the day and what parts need
25 to be ordered. (Lenarz Depo., 32:3-15; 45:2-48:22.) Mr. Lenarz also states that he
26 stops approximately once a week on the way to his first call of the day to pick up
27 parts and supplies for work, and that he stops on the way home at a mailbox to
28 mail paperwork to GCS. (Lenarz Depo., 52:9-23.) Another current GCS

1 technician, Peter Tzannakos, makes the final call from his car while driving home.
2 (Tzannakos Decl., 24:12-25:6.) Mr. Lenarz and Mr. Tzannakos also state that they
3 regularly inspect their vans before starting to drive to their first job site.
4 (Tzannakos Decl., ¶28:11-17.)
5

6 Technicians generally are not allowed to use the vans for personal purposes,
7 or to carry passengers in the vans. (Stevens Decl., ¶ 5; Stevens Depo:123:3-25;
8 Lenarz Depo. 54:18-25; Tzannakos Decl., ¶20-23.) However, GCS has a written
9 vehicle policy which allows “[l]imited personal use of company service vehicles
10 within the associate’s geographical work area ... subject to approval by the driver’s
11 manager.” (Exh. C to Stevens Decl., at 3.) Mr. Stevens was disciplined once for
12 violating the personal use policy, because he picked his grandson up from daycare
13 on his way home at the end of the day. (Stevens Decl., ¶ 5; Stevens Depo:123:3-
14 25; Lenarz Depo. 54:18-25; Pelaske Depo., 37:22-24.) However, a technician
15 named Paul Morrison received permission from a supervisor named Dave
16 Santilena in 2005 to use his van for errands on weekends. (Morrison Depo., 38:4-
17 22.) Mr. Morrison states that another supervisor, Ralph Turner, gave him a
18 contrary instruction that he could never use the van for personal use, and that
19 different supervisors have different policies regarding personal use of the vans.
20 (Morrison Depo., 39:2-40:9.) One former GCS supervisor, William Pelaske, states
21 that the technicians he supervised at GCS regularly used the vans for personal
22 errands on the way home from their last job site, and that he knew they did so but
23 never disciplined them for it. (Pelaske Depo., 36:14-37:13.)
24

25 Technicians also vary in the number of personal errands they run between
26 home and their first and last job sites. Mr. Stevens states that he never stopped for
27 coffee or to run errands on the way to work or going home, but that he would stop
28 for fuel. (Stevens Depo., 124:21-125:8; 126:1-19.) He also states that he used the

1 van approximately twenty times to drop his grandson off at day care. (Stevens
2 Depo., 123:3-25.) Several times during his 2002-2004 stint at GCS, Mr. Stevens
3 stopped to visit friends and/or meet with his lawyer on the way home from his last
4 job site. (Stevens Depo., 133:12-135:5; 138:1-12.) Mr. Morrison states that he
5 has stopped on the way to work for a snack or coffee. (Morrison Depo., 32:23-
6 33:5.) Mr. Lenarz states that he never stops on the way to work, other than to buy
7 fuel or pick up supplies, but that he has occasionally stopped at the grocery store
8 on the way home. (Lenarz Depo., 53:13-54:12; 55:2-7; 61:13-25.) Mr. Tzannakos
9 states that he would only stop on the way to work for fuel, and would occasionally
10 buy coffee on those stops. (Tzannakos Decl., 34:9-25.) Bill Burkner and Greg
11 King, technicians in Northern California, state that they occasionally run personal
12 errands or stop for coffee during their commutes. (Burkner Decl., ¶3; King Decl.,
13 ¶4.)

14
15 Technicians can choose what routes to take on the way to the first job site of
16 the day and home from the last site, and what speed to drive. (Stevens Depo.,
17 74:20-25.) They are required to have a GCS cell phone, and to use it during the
18 commute, including on the commute to the first job site of the day. (*Id.*, 119:22-
19 24; 120:3-121:3.) Mr. Stevens periodically would receive calls on his GCS cell
20 phone from GCS dispatchers on the way to his first job site, regarding changes in
21 the job site arrangement. (Stevens Depo., 155:23-156:17.) He was also permitted
22 to use his personal cell phone during the drive, and to make personal calls. (*Id.*,
23 112:10-14.) In 2005, after Mr. Stevens quit, GCS installed global positioning
24 satellite devices in its service vans to allow it to monitor technicians' locations.
25 (Tzannakos Depo., 79:12-23.) Mr. Tzannakos states that, since the GPS device
26 was installed in his van, he has received one telephone call from GCS during his
27 drive, telling him to slow down and that GCS was monitoring his speed.
28 (Tzannakos Depo., 82:8-13.) In February 2005, after the GPS systems were

1 installed, GCS sent a memorandum to its technicians entitled "Technician Use of
2 Time Tracking, Mapping & Communication Device-Basic Operation." (Plaintiff's
3 Exh. 22.) The memorandum instructed technicians to enter messages into the GPS
4 device, including hitting "send" "when you have started your day and in route to
5 your first stop." (*Id.*)

6
7 At all times during Mr. Stevens' employment, GCS had a policy of not
8 compensating its Los Angeles technicians for up to one hour of commuting time
9 from their home to the first service call of the day, and from the last service call of
10 the day back to their homes. (Stevens Depo., 35:9-36:2; Bogen Depo. 49:16-
11 50:25.) This policy was called the "reasonable commute" policy. (Bogen Depo.,
12 47:8-50:11.) GCS adopted the reasonable commute policy for the Northern
13 California area in late 2003, and it is now uniform through GCS's California
14 operations. (*Id.*, 51:12-57:25.) Prior to 2002, GCS's various regions had different
15 policies regarding commuting time. (Bogen Depo., 43:4-9.) In Northern
16 California, commute time was not reimbursed before 2002 absent extenuating
17 circumstances. (*Id.*, 43:10-13.)

18
19 During the day, technicians record their travel time and time spent at each
20 work site on dispatch logs. (Pelaske Decl., ¶7.)¹ Every week, the technicians fill
21 out a weekly log sheet with time totals for regular, overtime, doubletime, and
22 vacation pay, and personal leave, and submit them to a regional supervisor called a
23 "Field Service Manager" ("FSM"). (*Id.*; Exh. C to Pelaske Decl.) FSMs are
24 responsible for ensuring CGS' compliance with overtime laws, promoting sales,
25 and managing CGS' workforce in their specific areas. (Bogen Depo., 31:19-23;

26
27 ¹ Until 2002, technicians were required to call their dispatchers before they left for
28 their first job site of the day, because prior to 2002 GCS billed each client for the actual
amount of travel time the technician spent en route to the site. (Pelaske Decl., ¶ 8.)

1 32:2-6.) FSMs also review technicians' time tracker reports and log sheets. (Exh.
2 8 to Bogen Depo.)

3
4 During Mr. Stevens' employment at GCS, GCS had a formal written policy
5 establishing a 40-hour work week for technicians, with business hours from 8:00
6 to 5:00, which provided that employees were to take meal and rest breaks. (GCS
7 Exh. 23.) The policy stated, "It is the manager's responsibility to ensure that
8 policies regarding hours, meal breaks and rest periods are followed and that any
9 authorized exceptions are supported and documented on time records." (*Id.*) The
10 policy further stated that "the duration of meal breaks varies by division/location."
11 (*Id.*) While technicians generally were not permitted to work through meal breaks
12 to make up lost time, they were permitted to do so "in exceptional cases and with
13 manager approval." (*Id.*) When they did so, the policy stated, the time spent
14 working through the break "will be considered paid time." (*Id.*)

15
16 Despite GCS' written policy, Mr. Stevens did not take any lunch or rest
17 breaks during the day while he worked for GCS because his schedule and GCS'
18 productivity requirements did not allow it. (Stevens Depo., 272:15,18; 274:1-22.)
19 At one point, a GCS supervisor called Mr. Stevens and several other technicians
20 into a meeting and told them their production billing numbers were too low. (*Id.*,
21 287:4-7; 288:2-18.) Mr. Tzannakos states that he has never taken rest breaks and
22 did not take lunch breaks before March 2005, when GCS began insisting
23 employees do so. (Tzannakos Depo., 66:17-67:25.) Although GCS managers
24 periodically told technicians to take rest and meal breaks before March 2005, most
25 technicians in Los Angeles and Orange County did not. (Tzannakos Depo., 66:17-
26 21.) At a meeting with technicians in August 2004, GCS' Los Angeles FSM, Jim
27 Frisbee, told Mr. Stevens, Mr. Tzannakos, and Mr. Lenarz that GCS had been
28 contacted by an attorney about violations of the meal and rest break laws, and

1 instructed them to write down lunch breaks even if they did not take them.
2 (Stevens Depo., 274:13-275:2; 294:20-22; Tzannakos Depo., 63:9-24.)² Mr.
3 Frisbee also encouraged Mr. Stevens to travel to his next job site during his lunch
4 breaks to increase his productivity. (Stevens Depo., 274:13-275:2; 294:20-22.)
5 Mr. Lenarz states that, before March of 2005, GCS managers would tell
6 technicians that "they would prefer you do the job," and "they want[] you to get
7 the job done first." (Lenarz Depo., 99:2, 13-14.) Mr. Lenarz was never told
8 before March 2005 to take a meal break, and was routinely encouraged to work
9 through meal and rest breaks. (*Id.*, 99:23-25; 108:1-12.)
10

11 Several GCS technicians in Northern and Southern California, however, say
12 they have always been encouraged to take meal and lunch breaks, have never been
13 instructed to miss a break, and commonly take rest breaks throughout the day.
14 (King Decl., ¶¶ 6-7; Stanzone Decl., ¶¶ 6-7; Segner Decl., ¶¶ 6-7; Zastrow Decl.,
15 ¶¶ 6-7.) John Borsari, who has worked as a GCS technician for four years in
16 Northern California, states that the Pacific Regional Manager, Jeff Dahlin, and his
17 own supervisor told him shortly after he started working at GCS to take lunch
18 breaks. (Borsari Decl., 4.) He also states that he takes several rest breaks during
19 the day while waiting for equipment. (*Id.*, ¶3.) Andrew Speegle, who has worked
20 as a technician in Northern California for two years, states that his FSM told him
21

22 ² A copy of the minutes from that meeting is attached as Exhibit G to Mr. Lenarz'
23 Declaration. One item in the minutes states:

24 Lunch Breaks were discussed. Jim mentioned to all that the policy has been
25 discussed on more than one occasion in the past and that the policy is that
26 each technician should take a 1 hour per day break. Jim said that because of
27 the call back log in LA, we won't enforce the one hour rule but he needs
28 everyone to take 30 minutes per day and show that time off on the time
tracker.

(Exh. G to Lenarz Decl., ¶8.)

1 during orientation to take a half-hour meal break, and that the FSM reminds
2 technicians at least once a month to do so. (Speegle Decl., ¶4.)
3

4 On October 8, 2004, a GCS employee named Rita J. Garcia sent an e-mail to
5 GCS' Service Management Team. (Plaintiff's Appendix of Evidence, Exh. 21.)
6 The e-mail stated, among other things, that "[s]ervice technicians are indicating
7 that they have worked through lunch and have put in their eight hours." (*Id.*) It
8 instructed the GCS Service Management Team to "insure that the Service
9 Technician is in fact taking lunch vs. working through," and stated, "[t]his is both
10 a safety issue and a work hour[s] issue." (*Id.*)
11

12 Mr. Stevens' Complaint sets forth claims for (1) violation of California
13 Labor Code 202 and 1198, for failure to pay overtime; (2) violation of California
14 Labor Code Section 204; (3) violation of California Labor Code Sections 512 and
15 226.7, (4) failure to pay overtime compensation, (5) violation of California's
16 Unfair Competition Law ("UCL"), Business and Professions Code Section 17200
17 et seq., (6) declaratory relief, and (7) an accounting. Defendant moves for
18 summary judgment of Mr. Stevens' individual overtime and meal and rest break
19 claims, and Mr. Stevens moves to certify a class "consisting of non-exempt
20 technician employees of Defendants GCS Service Inc. and Ecolab, Inc....who work
21 or have worked for Defendants in California from 2000 to the present." (Motion
22 for Class Certification, p.1.)
23

24 **II. Defendants' Motion for Summary Judgment**

25

26 Federal Rule of Civil Procedure 56 states that a party is entitled to summary
27 judgment where "there is no genuine issue as to any material fact and the moving
28 party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is

1 material if it "might affect the outcome of the suit under the governing law."
2 *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). The moving party on a
3 summary judgment motion bears the initial burden of proving the absence of a
4 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
5 If the moving party does so, the burden shifts to the nonmoving party to
6 "designate specific facts showing that there is a genuine issue for trial." *Celotex*,
7 477 U.S. at 324 (citation omitted). Where, as here, the non-moving party bears the
8 burden of proof at trial on an element essential to its case, that party must present
9 evidence sufficient to establish a genuine dispute of fact with respect to the
10 existence of that element in order to avoid summary judgment. *Id.* at 322.

11 12 **A. Mr. Stevens' Overtime Claims**

13
14 Mr. Stevens asserts that he was entitled to overtime pay for time spent
15 commuting to and from work. In California, overtime compensation in particular
16 industries is governed by orders issued by the Industrial Welfare Commission
17 ("IWC"), the agency empowered to formulate regulations governing employment
18 in the state. *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 581 (2000);³ CAL.
19 LAB. CODE §§ 70-74, 1173, 1178, 1178.5, 1182. So far, the IWC has promulgated
20 18 wage orders. Twelve of them cover specific industries,⁴ four cover certain
21

22 ³ Employees are subject to state law regarding minimum wages and maximum
23 work weeks where the state standards are more protective of employees than federal law.
24 29 U.S.C. §218; *Aguilar v. Assn. for Retarded Citizens*, 234 Cal. App. 3d 21, 34 (1991).

25 ⁴ See 8 C.C.R. §§ 11010 (manufacturing industry), 11020 (personal service
26 industry), 11030 (canning, freezing, and preserving industry), 11050 (public housing
27 industry); 11060 (laundry, linen supply, and dry cleaning, and dyeing industry); 11070
28 (mercantile industry); 11080 (industries handling products after harvest); 11090
(transportation industry); 11100 (amusement and recreation industry); 11110
(broadcasting industry); 11120 (motion picture industry); 11130 (industries preparing
agricultural products for market, on the farm).

1 occupations,⁵ one is a general minimum wage order,⁶ and one applies to industries
2 and occupations not covered by, and all employees not specifically exempted in,
3 the wage orders in effect in 1997.⁷ See CAL. CODE REGS., tit.8, 11000-11170.

4
5 The parties agree that the applicable IWC order in this case is 8 C.C.R.
6 §11040, which applies to “all persons employed in professional, technical, clerical,
7 mechanical, and similar occupations.” 8 C.C.R. §11040(1). The order provides
8 that covered employees:

9
10 shall not be employed more than eight (8) hours in any workday or
11 more than 40 hours in any workweek unless the employee receives
12 one and a half (1 ½) times such employee’s regular rate of pay for all
13 hours worked over 40 hours in the workweek.

14
15 8 C.C.R. §11040(3)(A)(1).

16
17 “Hours worked” means:

18
19 the time during which an employee is subject to the control of an
20 employer, and includes all the time the employee is suffered or
21 permitted to work, whether or not required to do so.

22
23 8 C.C.R. §11040(2)(K).

24
25 ⁵ See 8 C.C.R. §§ 11040 (professional, technical, clerical, mechanical, and similar
26 occupations); 11140 (agricultural occupations); 11150 (household occupations); 11160
(certain on-site occupations in the construction, drilling, logging, and mining industries).

27 ⁶ See 8 C.C.R. § 11000.

28 ⁷ See 8 C.C.R. § 11170 (miscellaneous employees).

1 Interpreting identical language in a different wage order, the California
2 Supreme Court has held that “subject to the control of the employer” and “suffered
3 or permitted to work,” establish two separate standards, each of which is sufficient
4 to give rise to “hours worked.” *Morrillion*, 22 Cal. 4th at 582. “Thus, an
5 employee who is subject to an employer’s control does not have to be working
6 during that time to be compensated under [the wage order].” *Id.* Similarly, an
7 employer must pay overtime to an employee who is “suffered or permitted to
8 work,” even if not required to do so, whenever the employer knows or should
9 know that the employee is working overtime. *Id.* at 585. “Ordinary commute”
10 time, however, is not compensable under California law, *Morrillion*, 22 Cal. 4th at
11 587-88. The question, therefore, is whether Mr. Stevens has presented sufficient
12 evidence to create a genuine issue of material fact regarding whether he was
13 “subject to the control” of GCS during his commutes, or was “suffered or
14 permitted to work” during those commutes, so as to entitle him to overtime pay for
15 commuting time beyond eight hours in a day.

16
17 **1. “Subject to the Control of the Employer”**
18

19 In *Morrillion*, the California Supreme Court addressed the meaning of
20 “subject to the control of the employer.” The plaintiffs were a class of agricultural
21 workers who sought compensation for time spent traveling on buses to their
22 employer’s work site. They would gather every day at specified parking lots or
23 assembly areas, and the employer would transport them in buses that it provided
24 and paid for to the fields where they worked. *Id.* at 537. At the end of the day, the
25 employer would transport the employees on its buses back to the departure point.
26 *Id.* The employees provided their own transportation to and from the departure
27 points. The employer had rules prohibiting employees from using their own
28 transportation to and from the fields. *Id.*

1 The Court first distinguished between two types of travel to work: "travel
2 that the employer specifically compels and controls," which is compensable, and
3 "an ordinary commute that employees take on their own," which is not. *Id.* at 579
4 n.2. The agricultural workers' bus trips, the Court stated, fell into the former
5 category because the workers were on the employer's buses and not able "to use
6 'the time effectively for [their] own purposes.'" *Id.* at 586. The Court emphasized
7 that they could not drop off their children at school, stop for breakfast on the way
8 to the fields, or run other errands requiring the use of a car. *Id.* The fact that they
9 were allowed to read or perform other personal activities on the bus, the Court
10 held, did not diminish the employer's control over their activities and use of the
11 time. *Id.* The Court contrasted the agricultural workers from employees who
12 commute to work on their own, stating "[i]n contrast to [Defendant's] employees,"
13 commuter employees "decide when to leave, which route to take to work, and
14 which mode of transportation to use." *Id.* at 586-87. "By commuting on their
15 own," the Court stated, "employees may choose and may be able to run errands
16 before work and to leave from work early for personal appointments." *Id.* at 587.
17 The Court stated that "the level of the employer's control over its employees,
18 rather than the mere fact that the employer requires the employees' activity, is
19 determinative." *Id.* However, the Court cautioned that not all travel time to and
20 from work was compensable, and that the time employees spent traveling to and
21 from the bus departure points was not "hours worked." *Id.*

22
23 In 2003, an advice letter was issued by the Department of Labor Standards
24 Enforcement ("DLSE") addressing payment for commuting time.⁸ The letter was
25

26
27 ⁸ The DLSE is the state agency empowered to enforce California's labor laws and
28 IWC wage orders. *Huntington Memorial Hosp. v. Superior Court*, 131 Cal. App. 4th 893,
902 (2005). The California Supreme Court has held that DLSE policies intended to have
general prospective application, such as interpretive policies contained in the DLSE's

1 entitled "Travel Time for Employees with Alternative Worksites," and addressed
2 the situation of a non-exempt employee who spends five days in Bakersfield,
3 where he resides, and then five days at a work site in Palmdale. (Defendant's
4 Appendix of Authorities, Exh. 4.) The employee drives directly from his home to
5 the Palmdale site, and does not transport any significant materials from one work
6 site to the other. (*Id.*) Because it is an hour and a half commute between
7 Bakersfield and Palmdale, the employee incurs three hours of travel time on days
8 he drives to the Palmdale work site. (*Id.*) The DLSE responded by giving
9 examples of employees, such as carpenters, in industries "not assigned to a
10 specific workplace and routinely required to travel reasonable distances to job
11 sites on a daily basis." *Id.* at 3. A carpenter who is "employed by a contractor to
12 perform framing work would, under normal circumstances, have an expectation
13 that he or she was to report for work at the job site the contractor is currently
14 working," the DLSE said. "[I]f this is the routine, the framing carpenter could not
15 expect to be paid for the time commuting from his home to the job site if that job
16 site was within a reasonable distance." *Id.* However, the DLSE stated,
17 compensation could be required for "unreasonably extended travel," or if the
18 employee was required to deliver any "equipment, goods, or materials for the
19 employer." *Id.*

20
21 GCS argues that, under *Morrillion* and the DLSE letter, Mr. Stevens was
22 not "subject to [GCS'] control" during his commutes because GCS did not
23 determine his route, timing or activities. The Court agrees. Unlike the workers in
24 *Morrillion*, Mr. Stevens was able to choose when to leave for work in the morning

25
26 1989 Operations and Procedures Manual, are void unless promulgated pursuant to the
27 rulemaking procedures of the Administrative Procedure Act. *Tidewater Marine Western,*
28 *Inc. v. Bradshaw*, 14 Cal. 4th 557, 571-72 (1996). However, DLSE advice letters are not
subject to the APA's rulemaking provisions and are not void if not promulgated in
accordance with those provisions. *Id.* at 571; *Morrillion*, 22 Cal. 4th at 584.

1 and from work in the evening and what route to take, and was able to pick his
2 grandson up from day care. Mr. Stevens also periodically stopped and spent time
3 with friends on the way home from work, and once stopped to consult his attorney.
4 Although Mr. Stevens was not free to choose which mode of transportation to use,
5 and was subject to Defendant's policy regarding use of the vehicle, these factors
6 do not create the all-encompassing physical control exercised by the employer in
7 *Morrillion*, where the employer dictated when and where the employers would
8 convene for the bus ride, and the bus route. Like the hypothetical carpenter in the
9 DLSE letter, Mr. Stevens had "an expectation" that he would have to report to the
10 first job site to which he was assigned to work that day. Therefore, absent an
11 unreasonably long commute, Mr. Stevens was not entitled to compensation under
12 the "subject to the control of the employer" test.

13 14 2. "Suffered or Permitted to Work"

15
16 Mr. Stevens also argues that he was "suffered or permitted to work" during
17 his commute. In *Morrillion*, the California Supreme Court held that "'suffered or
18 permitted to work, whether or not required to do so' encompasses a meaning
19 distinct from merely 'working,'" and refers to any situation in which "[t]he
20 employer knows or has reason to believe that [the employee] is continuing to work
21 and the time is working time." *Morrillion*, 22 Cal. 4th at 584. In such cases, the
22 Court held, "it is the duty of the management to exercise its control and see that
23 the work is not performed if it does not want it to be performed." *Id.*

24
25 Mr. Stevens argues that he was "suffered or permitted to work" during his
26 commutes, because (1) driving was an "integral" part of the technician job, (2) he
27 delivered parts and supplies to worksites, and (3) technicians performed work
28 activities before and during the drive to the first job site and during and after

1 leaving the last job site. Specifically, Mr. Stevens presents evidence that some
2 technicians inspected the vans before starting their commute to the first job site,
3 talked to GCS' parts technician and other manufacturers on the phone during the
4 commute, stopped to pick up or drop off parts on the way to the first job site, and
5 stopped on the way home from the last job site to fax documents to GCS or from a
6 GCS authorized mailbox. (Lenarz Depo., 32:3-15; 45:2-48:22; 52:9-23; Tznnakos
7 Decl., 24:12-25:6.) GCS argues that Mr. Stevens was not suffered or permitted to
8 work because there is no evidence that he personally performed any work-related
9 tasks before or during the commute to the first job site, or during or after the
10 commute from his last job site home.

11
12 The Court agrees with GCS. As to Mr. Stevens' first argument, Mr. Stevens
13 appears to base his argument that the driving is "integral" on cases interpreting the
14 federal Portal to Portal Act, 29 U.S.C. §254(a). The Portal to Portal Act bars
15 employers from being liable under the FLSA for failing to pay employees
16 minimum wages or overtime for traveling "to and from the actual place of
17 performance of the principal activity or activities which such employee is
18 employed to perform" and "activities which are preliminary to or postliminary to
19 said principal activity or activities which occur either prior to the time on any
20 particular workday at which such employee commences, or subsequent to the time
21 on any particular workday at which he ceases, such principal activity or activities."
22 29 U.S.C. §254(a).

23
24 Activities are compensable under the Portal to Portal Act if they are an
25 "integral and indispensable" part of the principal activities for which the workers
26 are employed. *Steiner v. Mitchell*, 350 U.S. 247, 256; 76 S.Ct. 330 (1956); *IBP,*
27 *Inc. v. Alvarez*, 126 S.Ct. 514, 521; 163 L.Ed. 2d 288 (2005). Whether an activity
28 is "integral and indispensable" depends on several factors, including the degree to

1 which the activity is done for the employer's benefit, the degree to which the
2 activity is "indispensable...to the primary goal of the employee's work," the
3 amount of "choice the employee has in the matter," and the employer's ability to
4 maintain records of the time expended. *Reich v. New York City Transit Auth.*, 45
5 F.3d 646, 650 (2nd Cir. 1995). Courts interpreting the FLSA and the Portal to
6 Portal Act have held that commuting to a job is not a principal work activity, even
7 if the employee is transporting equipment or tools needed for the job, because
8 commuting does not involve any work or exertion beyond that necessary for
9 transportation to the worksite. *Id.* (automobile damage appraisers who did not
10 perform work before commuting to first site of the day, or after starting home from
11 the last site, were not entitled to compensation for commuting time under the
12 FLSA even if they transported light equipment to work, because the commute did
13 not involve work beyond that necessary for transportation); *Reich*, 45 F.3d at 651
14 (dog handlers were not entitled to compensation under the FLSA for time spent
15 commuting to work with their dogs, except to the extent they worked with the
16 dogs during the commute, because "the activity of commuting involved neither
17 exertion nor loss of time"); *Andrews v. DuBois*, 888 F. Supp. 213, 219 (D. Mass.
18 1995)(correctional officers in canine unit not entitled to compensation under the
19 FLSA for time spent commuting to work with the dogs, and commute was not
20 integral to the job, "[b]ecause the officers would make the same commute each day
21 irrespective of the dogs."); *Aiken v. City of Memphis*, 190 F.3d 753, 759 (6th Cir.
22 1999)(police officers not entitled to compensation under the FLSA for time spent
23 commuting to work in monitored police vehicles, because they performed only a
24 de minimus amount of compensable activities in the car during the commute.)

25
26 The California Supreme Court has cautioned that courts interpreting IWC
27 wage orders should give no deference to caselaw interpreting the Portal to Portal
28 Act and the FLSA, because the federal and California statutory schemes regarding

1 payment for travel time differ substantially. *Morrillion*, 22 Cal. 4th at 594-595.
2 Specifically, the California scheme, unlike the FLSA, does not include an express
3 exemption for travel time and was not motivated by a legislative intent to protect
4 employers from the financial burden of paying for such time. *Id.* at 590.
5 Nevertheless, because ordinary commuting time is not compensable under either
6 the FLSA or California law,⁹ the Court finds the FLSA cases instructive on the
7 question of what it means to be “suffered or permitted to work” during a commute,
8 as opposed to being engaged in a noncompensable ordinary commute, and
9 concludes that the crucial question is whether the commuting employee is engaged
10 in any work-related tasks or exertion during the commute, apart from merely
11 transporting herself to work.

12
13 Principles of statutory interpretation support the conclusion that the
14 “suffered or permitted to work” prong requires that a commuter be engaged in
15 work-related tasks or exertion in addition to mere transportation. In interpreting
16 regulations, courts must ascertain the intent of the agency according to the usual
17 meaning of the language used, and by avoiding any interpretation that renders any
18 language mere surplusage. *Modern Paint and Body Supply, Inc. v. State Board of*
19 *Equalization*, 87 Cal. App. 4th 703, 708 (2001)(citing *Brewer v. Patel*, 20 Cal.
20 App. 4th 1017, 1021 (1993)). Webster’s Ninth New Collegiate Dictionary defines
21 “work” as an “activity in which one exerts strength or faculties to do or perform
22 something” such as “sustained physical or mental effort to overcome obstacles and
23 achieve an objective or result,” “the labor, task, or duty that is one’s accustomed
24 means of livelihood” or “a specific task, duty, function, or assignment often being
25 a part or phase of some larger activity.” WEBSTER’S NINTH NEW COLLEGIATE
26 DICTIONARY 1358 (9th ed. 1991). In the Wage Order, the phrase “suffered or
27

28 ⁹ See *Morrillion*, 22 Cal. 4th at 587-88.

1 permitted to work” is used in addition to “subject to the control of the employer.”
2 As the two phrases must be construed to have independent meanings, the former
3 must require something beyond the mere status of being under the employer’s
4 control, such as work-related exertion or the performance of work-related tasks.
5 Because Mr. Stevens did not take any action or perform any task for GCS during
6 the commute, apart from transporting himself to work as any other commuter
7 would do, the Court concludes that he was not being “suffered or permitted to
8 work” during the commute time.¹⁰ Nor does the fact that GCS required Mr.
9 Stevens to have a valid drivers’ license and a clean safety record mean that he was
10 “suffered or permitted to work” during the commute, as the drivers’ license and
11 safety record did not require him to engage in any work-related tasks or exertion
12 apart from what he would have done during a commute in his own car. For Mr.
13 Stevens, the commute was simply a means of transportation to the site where the
14 main job, kitchen repair work, was carried out.

15
16 Mr. Stevens’ argument that he was “suffered or permitted to work” during
17 his commute because he delivered parts and supplies to worksites also fails,
18 because the undisputed evidence shows that Mr. Stevens did not pick the supplies
19 up from a business location in the morning before his first job or transport them to
20 a business location at the end of the day after his last job. GCS had no need for
21 the supplies to travel between Mr. Stevens’ home and his first and last daily
22 jobsites. Consequently, between Mr. Stevens’ last job of the day and the first job
23

24
25 ¹⁰ Mr. Stevens also argues that GCS should be required to compensate technicians
26 for their commute time because GCS charged its customers for that time. However, the
27 undisputed evidence shows that since 2002 GCS has charged its customers not based on
28 the amount of time technicians spent commuting to the job sites but instead charged a flat
“trip charge.” (Tzannakos Decl. re Class Certification, ¶¶ 9.) Moreover, Mr. Stevens
does not cite, and the Court has not found, any authority for the proposition that whether
time is compensable depends on whether the employer charges customers for the time.

1 of the next day, the supplies were not taken on any delivery route for GCS but
2 were merely taken on a detour to his home while he slept and conducted personal
3 activities. Nor did the supplies require Mr. Stevens to engage in any effort or
4 exertion during his commutes, apart from what he would do if he were driving in a
5 car without supplies. As a practical matter, Mr. Stevens taking parts and supplies
6 from his home to his first job site and home from his last job site is
7 indistinguishable from any employee who takes to and from work tools or supplies
8 needed to perform the job, leaves them in the car overnight after driving home,
9 and drives to work again the next day.

10
11 Mr. Stevens' third argument, that technicians performed work-related tasks
12 during the commute, before the morning commute, and after the evening commute,
13 is also unavailing because Mr. Stevens presents no evidence that he performed any
14 such tasks. Although Mr. Stevens presents evidence that Mr. Lenarz and Mr.
15 Tzannakos often inspected their vehicles before driving to the first job site, or
16 called the dispatch center or stopped for supplies en route to the first job or home
17 from their last job, Mr. Stevens admits that he himself did not call the dispatcher
18 during his commutes, and does not contend that he ever inspected his vehicle or
19 stopped en route to mail documents to GCS, pick up supplies, or do any other
20 work-related activity. He states that he waited to make the first call of the
21 morning until he arrived at his first job site, and made his last call before he began
22 driving home from his last job. In short, there is no evidence that Mr. Stevens
23 performed any work during his commutes so as to entitle him to overtime
24 compensation.¹¹

25
26
27 ¹¹ Mr. Stevens also argues that he is entitled to compensation under the FLSA
28 "whistle to whistle" doctrine, which states that "periods of time between the
commencement of the employee's first principal activity and the completion of his last
principal activity on any workday must be included in the computation of 'hours

1 For the foregoing reasons, Defendants are entitled to summary judgment of
2 Mr. Stevens' claims to the extent those claims rest on failure to pay overtime
3 compensation for commuting time.

4
5 **B. Meal and Rest Break Claims**

6
7 Mr. Stevens also asserts that he was denied meals and rest breaks required
8 to be provided under Labor Code Section 512. That section and the Wage Order
9 prohibit an employer from employing an employee for a work period of more than
10 five hours per day without providing the employee with a meal break of at least 30
11 minutes, but provide that if the total work day is no more than six hours the meal
12 break may be waived by mutual consent of the employee and the employer. CAL.
13 LAB. CODE §512; 8 C.F.R. §11040(11). Section 512 also authorizes the IWC to
14 adopt a working condition order allowing a meal period to commence after six
15 hours if the IWC determines that such an order is consistent with the health and
16 welfare of affected employees. *Id.* §512(b). The Wage Order further provides:

17
18 Every employer shall authorize and permit all employees to take rest
19 periods, which insofar as practicable shall be in the middle of each
20 work period. The authorized rest period time shall be based on the
21 total hours worked daily at the rate of ten (10) minutes net rest time
22 per four (4) hours or major fraction thereof. ...Authorized rest time
23 shall be counted as hours worked or which there shall be no
24 deduction from wages.

25
26
27 worked.'" 29 C.F.R. 790.6. However, this argument does not succeed because Mr.
28 Stevens has not shown that he performed any work-related activities before he arrived at
his first job site of the day or after he left his last one.

1 8 C.C.R. §11040(12)(A).

2

3 Mr. Stevens argues that GCS violated Section 512 and the Wage Order
4 because it did not require its technicians to take meal or rest breaks, imposed
5 productivity requirements that discouraged them from taking the breaks, and
6 implicitly encouraged them not to do so. GCS argues that it is not liable for
7 failing to provide meal or rest breaks because it had a formal written policy that
8 employees were to take them, and Mr. Stevens voluntarily chose to forego them.
9 Essentially, GCS argues that an employer is not required to force its employees to
10 take meal or rest breaks.

11

12 Employers' duties under Section 512 are not satisfied by merely assuming
13 that employees have taken meal breaks, because employers have "an affirmative
14 obligation to ensure that workers are actually relieved of all duty" during meal
15 break time. *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949
16 (2005)(quoting DLSE Opinion Letter 2002.01.28 p.1.) In *Cicairos*, the plaintiffs
17 were truck drivers who sued their employer for violations of the meal and rest
18 break provisions and failure to provide itemized wage statements. The employer
19 used an "activity based compensation" system to determine the plaintiffs' wages,
20 which required the employees to record such factors as speed, starts and stops, and
21 time. *Id.* at 954. Absent a designated reason for a delay, such as road
22 construction, a trip that took longer than expected would result in the employee
23 losing pay by not being compensated for the extra time. *Id.* The employer did not
24 schedule meal periods or include an activity code for them, and the plaintiffs said
25 they felt pressured not to take meal or rest breaks because they would lose money
26 if they did so. *Id.* The employer argued that it had not violated meal or rest break
27 provisions, because it could not control its employees' schedule while they were
28 on the road. *Id.* at 963. The court reversed the lower court's grant of summary

1 judgment for the employer, holding that the employer had not met its affirmative
2 obligation to ensure that workers were relieved of all duty for meal breaks. *Id.* It
3 also held that the employer had failed to “authorize or permit” rest breaks, because
4 “as a practical matter, [it] did not *permit* the plaintiffs to take their rest breaks.”
5 *Id.* (emphasis in original.) The court pointed out that the compensation system did
6 not allow rest breaks as a compensable excuse for delays, but docked workers’
7 compensation for the lost rest break time, and that this may have encouraged
8 drivers to skip them. *Id.*

9
10 Similarly, in this case Mr. Stevens alleges that GCS relied on technicians to
11 take meal breaks on their own schedule, discouraged him from taking breaks by
12 imposing productivity requirements that did not allow for them, and did not
13 affirmatively schedule time for breaks during the day. According to Mr. Stevens,
14 “it’s very difficult for any technician to say, no, wait, let me stop, let [me] take my
15 lunch break. Even to the point where you are in between a call, a lunch break isn’t
16 practical because you are on the way to fix another piece of equipment that’s
17 down, and it’s very difficult...to say no to a customer.” (Stevens Depo., 274:6-12.)
18 He states that GCS enforced its stringent productivity requirements against him
19 and discouraged him from taking meal breaks by calling him and several other
20 technicians into a meeting and telling them their production billing numbers were
21 too low. (*Id.*, 287:4-7; 288:2-18.) Mr. Stevens also alleges that Mr. Frisbee
22 instructed him to skip his lunch breaks but to write down that he had taken them
23 anyway: “[h]e said ‘Write it down and then travel to your next call while you’re
24 on lunch.’” (*Id.*, 294:15-22.) Under California law, GCS was obligated to ensure
25 that, as a practical matter, rest breaks were “authorized and permitted,” and had an
26 affirmative obligation to ensure that its employees were relieved of all duty during
27 meal breaks. Mr. Stevens presents facts sufficient to allow a reasonable jury to
28 find that GCS did not meet those obligations. Consequently, GCS is not entitled

1 to summary judgment of Mr. Stevens' meal and rest break claims.

2
3 **III. Mr. Stevens' Motion for Class Certification**

4
5 Mr. Stevens seeks to certify a class of "consisting of non-exempt technician
6 employees of Defendants GCS Service Inc. and Ecolab, Inc....who work or have
7 worked for Defendants in California from 2000 to the present." (Motion for Class
8 Certification, p.1.) Federal Rule of Civil Procedure 23 sets forth two sets of
9 requirements for class certification. First, the proposed class must satisfy the four
10 requirements of Rule 23(a): (1) the class is so numerous that joinder of all
11 members is impracticable, (2) there are questions of law or fact common to the
12 class, (3) the claims or defenses of the representative parties are typical of the
13 claims or defenses of the class, and (4) the representative parties will fairly and
14 adequately protect the interests of the class. FED. R. CIV. P. 23(a). In addition, the
15 party seeking certification must show that the action falls within one of the three
16 subsections of Rule 23(b). Although a district court is "at liberty" to consider
17 evidence relating to the merits of the plaintiff's claim if such evidence is relevant
18 to Rule 23's requirements, it may not consider whether the party seeking
19 certification is likely to prevail on the merits. *Cornn v. United Parcel Service*,
20 2005 WL 2072091 at *2 (N.D. Cal. Aug. 26, 2005)(quoting *Eisen v. Carlisle &*
21 *Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974); *Hanon v.*
22 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

23
24 Mr. Stevens seeks class certification pursuant to subsections (b)(2) and
25 (b)(3) of Rule 23. Subsection (b)(2) requires that "the party opposing the class has
26 acted or refused to act on grounds generally applicable to the class, thereby
27 making appropriate final injunctive relief or corresponding declaratory relief with
28 respect to the class as a whole." FED. R. CIV. P. 23(b) (2). Subsection (b)(3)

1 allows certification where "the court finds that questions of law or fact common to
2 the members of the class predominate over any questions affecting only individual
3 members, and that a class action is superior to other available methods for the fair
4 and efficient adjudication of the controversy." FED. R. CIV. P. 23(b) (3).

5
6 Mr. Stevens has failed to meet the requirements for certification under either
7 subsection, because the evidence indicates that GCS' meal and rest break policies
8 were not uniform throughout California. GCS' written policy sets forth no
9 standard times or schedules for meal or rest breaks, but states that "the duration of
10 meal breaks varies by division/location." (GCS Exh. 23.) While Mr. Stevens
11 presents evidence that he and some other Los Angeles and Orange County
12 technicians were encouraged to skip their meal breaks,¹² GCS presents
13 declarations from technicians in Northern and Southern California indicating that
14 FCMs were the individuals responsible for ensuring that employees took rest and
15 meal breaks, and that different FCMs imposed different requirements. (King
16 Decl., ¶¶ 6-7; Stanzione Decl., ¶¶ 6-7; Segner Decl., ¶¶ 6-7; Zastrow Decl., ¶¶ 6-7.)
17 John Borsari and Andrew Speegle, who have worked as GCS technicians in
18 Northern California for the last four years and two years, respectively, state that
19 their supervisors told them to take lunch breaks shortly after they started working
20 for GCS, and that their supervisors still remind them to take the breaks. (Borsari
21 Decl., ¶¶ 3, 4; Speegle Decl., ¶4.) Mr. Borsari states that he takes several rest
22
23
24

25 ¹² Mr. Tzannakos and Mr. Lenarz, who state that they were encouraged to skip
26 breaks, both worked in the Los Angeles and Orange County regions. While they do not
27 specify which regions their testimony pertains to, they do not establish any foundation for
28 testimony regarding GCS's policies in regions other than the ones in which they worked.
Thus, their testimony properly is interpreted as pertaining only to GCS' practices in Los
Angeles and Orange County.

1 breaks during the day while waiting for equipment. (Borsari Decl., ¶¶ 3, 4.)¹³
2 Banti Tsehayo, who has worked as a GCS technician in Northern California for
3 the past seven years, states that he takes meal and rest breaks every day, and that
4 his supervisor text-messages him to remind him to do so. (Tsehayo Decl., ¶¶ 4-5.)
5 Bill Segner and Robert Stanzione, technicians in Southern California, state that
6 they regularly take meal and rest breaks, and that no supervisor has ever told them
7 to skip a break. (Segner Decl., ¶¶ 6-7; Stanzione Decl., ¶¶ 6-7.) Mr. Lenarz, who
8 worked in Los Angeles, states that he was never told before March 2005 to take a
9 meal break, and that supervisors routinely encouraged him and other technicians to
10 work through meal and rest breaks. (*Id.*, 99:23-25; 108:1-12.) Mr. Stevens states
11 that Mr. Frisbee told him to write down that he had taken breaks even if he did not
12 actually do so. (Stevens Depo., 294:15-22.) Overall, the technicians' statements
13 indicate an absence of any uniform procedures among FCMs regarding meal or
14 rest breaks.

15
16 Mr. Stevens' evidence also indicates that Los Angeles adopted unique
17 productivity requirements and meal and rest break policies during the putative
18 class period to address a work crunch that was particular to the Los Angeles
19 region. The minutes of the August 2004 meeting, at which Mr. Frisbee allegedly
20 instructed technicians to write down breaks they did not take, state that Los
21 Angeles was adopting special break policies and not enforcing GCS' formal policy

22
23
24 ¹³ Mr. Stevens urges the Court to give less weight to the technician declarations
25 submitted by GCS, arguing that those declarations are from current GCS employees who
26 may be afraid to give testimony contrary to GCS' interests in this case. However, Mr.
27 Tzannakos and Mr. Lenarz, who provide declarations in support of Mr. Stevens's class
28 certification motion, also are current employees of GCS. Moreover, while the Court is
aware of the possibility that current employees might be reluctant to make statements
unfavorable to GCS, the Court declines to discount their declarations entirely. Current
GCS employees' statements are relevant evidence bearing on the issue whether GCS had
uniform productivity, meal, and rest break policies during the proposed class period.

1 due to "the call back log in LA." (Exh. G to Lenarz Decl.) No evidence is
2 presented regarding the call back log in the Northern California, Orange County,
3 San Diego, or other regions, and the only reasonable inference from the August
4 2004 minutes is that those regions' workload and productivity requirements
5 differed from Los Angeles' requirements. In sum, certification under subsection
6 (b)(2) is not proper because Mr. Stevens has not shown that GCS acted or refused
7 to act on grounds generally applicable to the proposed statewide class with regard
8 to meal and rest breaks.

9
10 Rule 23(b)(3) also is not satisfied because Mr. Stevens has not shown that
11 questions of law or fact common to the putative class are likely to predominate
12 over individual questions so as to make a class action a superior method of
13 resolving putative class members' claims. Under California law, whether GCS
14 violated meal and rest break requirements depends on whether it imposed
15 productivity demands that did not allow for breaks, whether it failed affirmatively
16 to ensure that employees were taking meal breaks, and whether particular
17 employees failed to take the breaks as a result. However, the only evidence that
18 has been submitted regarding GCS' policies in regions other than Los Angeles and
19 Orange County indicates that FCMs in those regions had different policies
20 regarding meal and rest breaks, which suggests that numerous questions would
21 arise at trial regarding supervisor-and region-specific policies. The minutes of the
22 August 2004 meeting with Mr. Frisbee reinforce the likelihood of multiple
23 inquiries, because they indicate that the Los Angeles region was adopting unique
24 meal and rest period policies due to its "call back log." (Exh. G to Lenarz Decl.)
25

26 Mr. Stevens cites the October 8, 2004 e-mail from Rita J. Garcia, which was
27 sent to FCMs throughout California and which stated that some technicians had
28 been working through lunch, as evidence that GCS had uniform meal and rest

1 break policies throughout the state. However, evidence that some technicians in
2 California indicated they had been working through lunch, and that a responsive
3 email was sent to a statewide group, is not evidence that GCS maintained
4 statewide productivity requirements and meal and rest break practices. Rather, the
5 email appears to be simply a declaration of a general company policy that
6 technicians are to take meal and rest breaks "vs. working through." (Plaintiff's
7 Appendix of Evidence, Exh. 21.) The e-mail does nothing to controvert the
8 evidence in the record that specific productivity requirements varied among
9 regions, and that different supervisors enforced the rest and meal break policy to
10 varying degrees and in different ways. Overall, Mr. Stevens has not shown that
11 common questions are likely to predominate over questions regarding individual
12 employees' work habits and region- and supervisor- specific policies. All the
13 evidence suggests that such particularized inquiries will overwhelm any questions
14 common to the class.

15
16 **IV. Conclusion**

17
18 For the foregoing reasons, Defendants are entitled to partial summary
19 judgment on Mr. Stevens' overtime claims, and Mr. Stevens' motion for class
20 certification is DENIED.

21
22 DATED: *April 6, 2006*


23
24 
25 CORMAC J. CARNEY
26 UNITED STATES DISTRICT JUDGE
27
28

EXHIBIT H

LEXSEE 2007 US DIST LEXIS 66010

DONALD J. TORMEY, on behalf of himself, and all others similarly situated, and on behalf of the general public, Plaintiffs, vs. **THE VONS COMPANIES, INC.**, a Michigan Corporation; **SAFEWAY, INC.**, a Delaware Corporation and **DOES 1 through 100**, Defendants.

CASE NO. 07cv1587-LA (RBB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

2007 U.S. Dist. LEXIS 66010

September 5, 2007, Decided
September 5, 2007, Filed

PRIOR HISTORY: Tormey v. Vons Cos., 2007 U.S. Dist. LEXIS 60076 (S.D. Cal., Aug. 15, 2007)

COUNSEL: [*1] For Donald J. Tormey, on behalf of himself, and all others similarly situated, and on behalf of the general public, Plaintiff: Eric Maxwell Overholt, LEAD ATTORNEY, Hiden Rott and Oertle, San Diego, CA.

For The Vons Companies, Inc., a Michigan Corporation, Safeway Inc., a Delaware Corporation, Defendants: Todd Christopher Bouton, LEAD ATTORNEY, Payne and Fears, Irvine, CA.

JUDGES: HONORABLE LARRY ALAN BURNS, United States District Judge.

OPINION BY: LARRY ALAN BURNS

OPINION

ORDER OF REMAND

On June 29, 2007, Plaintiff Tormey filed this putative class action in the Superior Court of California, County of San Diego. Defendants then on August 10, 2007 removed the action to this Court, representing that the provisions of the Removal Statute, 28 U.S.C. § 1446, were met. Defendants contended this Court had federal question jurisdiction because some of Defendants claims were completely preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("Section 301"). Plaintiffs also asked the Court to exercise supplemental jurisdiction over other related state claims.

Because the Court's jurisdiction was not clear, the Court on August 15, 2007 *sua sponte* issued an order to show cause requiring Plaintiffs to [*2] show cause why this action should not be remanded. On August 22, 2007, Plaintiffs responded and, on August 29, Defendant replied to Plaintiffs' response. Defendants' response identifies federal question jurisdiction, and supplemental jurisdiction, as the sole bases for this Court's exercise of jurisdiction over this action.

I. Legal Standards

The Court is under an independent obligation to examine whether removal jurisdiction exists. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004) (citations omitted). "The removal statute is strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute." *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004) (citation omitted). Pursuant to 28 U.S.C. § 1447(c), the Court must remand the case to state court if at any time before final judgment it appears the Court lacks subject matter jurisdiction.

II. Discussion

A. Plaintiff's Claim

Plaintiff, a pharmacist, was employed by Defendant Vons Companies, during which time Defendants represent his employment was governed by a collective bargaining agreement ("CBA"). He seeks unpaid rest and meal [*3] period compensation, penalties, disgorgement, restitution, and injunctive relief on behalf of himself and all others similarly situated. He relies on Cali-

fornia Labor Code §§ 226.7 and 512; California Business and Professions Code §§ 17200-17208; California Code of Regulations, Title 8, § 11040, and Industrial Welfare Commission ("IWC") Wage Order No. 4-2001.

Defendants contend Plaintiffs unpaid meal period compensation claim is completely preempted by Section 301. They concede, however, that the rest period claims are not, and ask the Court to exercise supplemental jurisdiction over these claims.

B. Jurisdictional Analysis

Under the well-pleaded complaint rule, federal jurisdiction typically exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1075 (9th Cir. 2005) (citations omitted). "A federal law defense to a state-law claim does not confer jurisdiction on a federal court, even if the defense is that of federal preemption and is anticipated in the plaintiff's complaint. *Id.* (citation omitted). "This rule makes a plaintiff the 'master of his complaint': He may generally avoid federal jurisdiction [*4] by pleading solely state-law claims." *Id.* (citation omitted).

A corollary to the well-pleaded complaint rule, however, is the "complete preemption doctrine," which may "convert[] an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (citation omitted). The Supreme Court has explained that "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988) (footnotes and citations omitted). However, "not every dispute tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." *Id.* at 413 n.12 (citation and alterations omitted). Furthermore, a party cannot trigger section 301 preemption merely by asserting the waiver of a state-law claim in a collective bargaining agreement. *Caterpillar*, 482 U.S. at 398.

Section 301 "is not designed to trump substantive and mandatory state law regulation of the [*5] employee-employer relationship. . . ." *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005) (citation omitted). Thus, a claim brought on the basis of a mandatory state law is not preempted, even if an identical claim could be brought under Section 301. *Id.* (citing *Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)). Section 301 "cannot be read broadly

to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Id.* If the law were otherwise, employers could immunize themselves from suit under state labor laws of general applicability by including unlawful terms in collective bargaining agreements. *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1111 (9th Cir. 2000).

The Ninth Circuit has examined meal period requirements under California state law and has determined them to be non-negotiable and therefore not preempted by Section 301. *Valles*, 410 F.3d at 1081-82. While a state might create a non-negotiable remedy that turned on the interpretation of a collective bargaining agreement, California's meal period laws do not appear to be an example of this. *Id.* (citing *Lingle*, 486 U.S. at 407 n.7).

Defendants contend that IWC Wage Order No. [*6] 7-2001 applies to Plaintiff's claims, and authorizes special arrangements for meal periods. Defendants contend the CBA altered meal period rights, as permitted under Wage Order No. 7-2001. They argue this creates a situation where, although the right may be governed by state law, construction of the CBA will be necessary to resolve it, resulting in complete preemption.

Plaintiff argues he does not rely on Wage Order No. 7-2001, but on No. 4-2001. However, regardless of which Wage Order applies, Plaintiff has not alleged that Defendants provided meal periods as permitted in the CBA, but rather that they provided no meal periods and no meal period compensation as required under state law. (Complaint at 2:23-28, 3:25-4:2, 5:15-17, 5:22-27, 7:22-26, 8:7-11, 9:22-26, 11:8-14, 11:19-24.) The CBA purports to address whether pharmacists may be called back to duty in emergencies and, under certain circumstances requires them to take meal periods in the building where they work, but it does not purport to permit Defendants to provide no meal periods at all. Even if, as Defendants argue, the CBA provides for the waiver of meal period rights, it appears this constitutes the kind of waiver the Supreme [*7] Court warned of in *Livadas*, 512 U.S. 107, 123, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)).

While Defendants may raise the CBA's terms as a defense, Plaintiff has not relied on them in making his claims. The Court is mindful of the teaching of the Supreme Court in *Caterpillar*:

It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question,

2007 U.S. Dist. LEXIS 66010, *

even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule -- that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing.

482 U.S. at 398-99. [*8] Should it prove that Plaintiff's complaint as pleaded is inadequate and he amends so that a federal question appears on the face of the amended complaint, Defendants might attempt removal at that time, pursuant to 28 U.S.C. § 1446(b). At present, however, the Court is not persuaded that Defendants have carried their burden of establishing the existence of federal jurisdiction over this action. *Dynegy*, 375 F.3d at 838.

III. Conclusion and Order

For these reasons, this action is hereby **REMANDED** to the court from which it was removed.

IT IS SO ORDERED.

DATED: September 5, 2007

HONORABLE LARRY ALAN BURNS

United States District Judge

EXHIBIT I



FILED
ALAMEDA COUNTY

DEC 12 2006

CLERK OF THE SUPERIOR COURT

By Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

NICK TORRES, et al,

Plaintiffs,

v.

ABC SECURITY SERVICE, INC., et al,

Defendants.

No. RG04 -158744

ORDER GRANTING IN PART AND
DENYING IN PART THE MOTION OF
PLAINTIFFS FOR CLASS
CERTIFICATION

Date: November 30, 2006

Time: 2:00 p.m.

Dept.: 22

The motion by Plaintiffs for class certification came on regularly for hearing on November 30, 2006, in Department 22, the Honorable Ronald M. Sabraw, presiding. Plaintiffs and Defendants appeared at the hearing through counsel of record. The Court, after full consideration of all papers submitted in support and opposition to the motion, as well as the oral arguments of counsel, decides as follows: IT IS HEREBY ORDERED that Plaintiffs' motion for class certification is GRANTED in part and DENIED in part.

FACTUAL BACKGROUND

This is a purported class action on behalf of all persons employed by ABC Security Services, Inc. ("ABC") in any non-exempt security guard/officer positions ("security guards"). The Fourth Amended Complaint filed August 8, 2006, alleges that ABC unlawfully (1) requires SGs to make excessive deposits for their uniforms, Labor Code 402, (2) fails to pay interest on the uniform deposits, Labor Code 404, (3) imposes charges for the return of dirty or worn

1 uniforms, Labor Code 2802, (4) fails to reimburse SGs who incur expenses in cleaning and
2 maintaining uniforms Labor Code 2802, (5) requires SGs to pay for obtaining guard cards, (6)
3 fails to provide meal periods and rest breaks, Labor Code 512 and Wage Order section 12, (7)
4 fails to pay overtime when SGs swap shifts, and (8) fails to provide accurate wage statements.
5 The parties agree that the relevant wage order for security guards is Wage Order 4-2001, located
6 at 8 Cal.Code.Reg. 11040. Plaintiffs seek to certify a class for all claims in the Complaint.

8 ASCERTAINABILITY AND NUMEROSITY

9 Plaintiffs proposes a class of all security guards during the relevant time frame. ABC
10 does not contest the ascertainability requirement.

11 The proposed class includes approximately 500 persons, with approximately 200 persons
12 in the proposed subclass. This is sufficiently numerous.

14 COMMON QUESTIONS OF LAW AND FACT - LEGAL FRAMEWORK.

15 Plaintiff's burden on moving for class certification is not merely to show that some
16 common issues exist, but, rather, to place substantial evidence in the record that common issues
17 predominate. ... "[T]his means 'each member must not be required to individually litigate
18 numerous and substantial questions to determine his [or her] right to recover following the class
19 judgment; and the issues which may be jointly tried, when compared with those requiring
20 separate adjudication, must be sufficiently numerous and substantial to make the class action
21 advantageous to the judicial process and to the litigants.'" *Lockheed Martin Corp. v. Superior*
22 *Court* (2003) 29 Cal. 4th 1096, 1108. "The ultimate question in [class actions] is whether . . . the
23 issues which may be jointly tried, when compared with those requiring separate adjudication, are
24 so numerous or substantial that the maintenance of a class action would be advantageous to the
25 judicial process and to the litigants." *Lockheed Martin*, 29 Cal. 4th at 1104-1105.

1 Some cases have what the Court will refer to as "absolute commonality." In these cases
2 every member of the proposed class was exposed to the allegedly wrongful practice and the
3 practice was either consistently lawful or unlawful as to all members of the class. The
4 defendant's action can be found to be wrong in the abstract without examining whether it was
5 wrongful as to any individual classmember. *Aguiar v. Cintas Corporation No. 2* (2006) 2006
6 Cal. App. LEXIS 1663 (applicability of Living Wage Ordinance); *In re Cipro Cases I & II*
7 (2004) 121 Cal. App. 4th 402, 411 (antitrust violations); *Massachusetts Mutual Life Ins. Co. v.*
8 *Superior Court*, (2002) 97 Cal. App. 4th 1282, 1292-1294 (misrepresentations); *Reyes v. Board*
9 *of Supervisors* (1987) 196 Cal.App.3d 1263, 1278 (erroneous interpretation of legislation). In
10 cases with "absolute commonality," the Court can extrapolate liability findings from the trial
11 witnesses to the absent class members with a great deal of certainty. In a case with absolute
12 commonality, each member of the putative class is identically situated with regard to liability and
13 by definition has standing to maintain the action on his or her own behalf. *Collins v. Safeway*
14 *Stores, Inc.* (1986) 187 Cal. App. 3d 62, 73. To the extent there are differences among class
15 members, they usually relate to the amount of damages that each class member can recover. *Sav-*
16 *On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 333.

17 Other cases have what the Court will refer to as "partial commonality." In these cases
18 every member of the proposed class was exposed to a practice but the trier of fact cannot
19 determine whether the practice was lawful as to any given member of the class without
20 considering individualized factors. The Court can certify a class based on a demonstration of
21 partial commonality. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319,
22 addresses this in several places, stating, "Predominance is a comparative concept," 34 Cal. 4th at
23 334, that the community of interest requirement does not mandate that class members' claims be
24 uniform or identical, 34 Cal.4th at 338, that the "logic of predominance" does not require a
25 plaintiff to prove that a defendant's policy was "either right as to all members of the class or
26 wrong as to all members of the class," 34 Cal. 4th at 338, and "the established legal standard for

1 commonality ... is comparative,” 34 Cal.4th at 339. The federal rules of civil procedure
2 expressly provide for partial commonality. F.R.C.P. 23(b)(2) (injunction only classes without a
3 showing of predominance); F.R.C.P. 23(c)(4) (single issue certification).

4 The determination of how much commonality is enough to warrant use of the class
5 mechanism requires a fact specific evaluation of the claims, the common evidence, and the
6 anticipated conduct of the trial. For example, it can be appropriate to certify a class of women to
7 pursue claims for sex discrimination where an employer has a pattern of denying promotions to
8 women even though not all women were denied promotions. *Stephens v. Montgomery Ward*
9 (1987) 193 Cal.App.3d 411, 416 fn1. To ensure that the class mechanism will really be useful, in
10 cases with “partial commonality” the Court usually makes some limited inquiry into whether the
11 plaintiff has an isolated claim or whether there are numerous similar incidents. *Int’l Bhd. of*
12 *Teamsters v. United States* (1977) 431 U.S. 324, 336 (defining “pattern or practice”). This can
13 take the Court close to a merits analysis. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 332.

14 “Partial commonality” cases pose a greater challenge than “absolute commonality” cases
15 because the Court cannot automatically extrapolate liability findings from the trial witnesses to
16 the absent class members. In these cases the Court has to devise “pragmatic procedural devices”
17 and “innovative procedural tools” to structure a trial that provides significant benefits to the
18 parties and the Court while at the same time protecting the rights of all the parties. *State of*
19 *California v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460, 471. Because “partial commonality”
20 cases present greater trial management concerns, a plaintiff seeking to pursue such a case should
21 present a manageable trial plan at the class certification stage. *Washington Mutual Bank v.*
22 *Superior Court* (2001) 24 Cal. 4th 906, 923 (“the presentation must be sufficient to permit the
23 district court, at the time of certification, to make a detailed assessment of how the difficulties
24 posed by the variations in state law will be managed at trial”). See also *Southwestern Ref. Co. v.*
25 *Bernal* (Tex. Sup., 2000) 22 S.W.3d 425, 435 (“We reject [the] approach of certify now and
26 worry later.”).

1
2 COMMON QUESTIONS OF LAW AND FACT - ANALYSIS.

3 Commonality is determined with reference to the claims asserted. *Hicks v. Kaufman and*
4 *Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 fn 22. The Court examines each claim in
5 turn.

6 Uniform claims. Common issues will predominate at trial concerning whether ABC
7 unlawfully requires SGs to make excessive deposits for their uniforms, Labor Code 402, fails to
8 pay interest on the uniform deposits, Labor Code 404, imposes charges for the return of dirty or
9 worn uniforms, Labor Code 2802, and fails to reimburse SGs who incur expenses in cleaning and
10 maintaining uniforms, Labor Code 2802. All of these claims are based on ABC's consistent
11 policies. Therefore, there is "absolute commonality" – either the policies are lawful as to all
12 SGs or they are unlawful as to all SGs. Variations in the damages that the SGs have suffered, if
13 any, can be addressed through a claims process or accounting and do not preclude class
14 certification.

15 Guard cards. Common issues will predominate at trial concerning whether ABC
16 unlawfully requires SGs to pay for obtaining and maintaining guard cards. California's Bureau
17 of Consumer Affairs requires that security guards take security training tests and pass a test to get
18 a guard card. Thereafter, the guard must pay an annual \$122.00 to maintain the card. ABC has
19 a consistent policy of requiring SGs to maintain their own guard cards at their own expense. If
20 an employee does not maintain a card independently, ABC will pay the fee and deduct the \$122
21 charge from the guard's paycheck. There is "absolute commonality" in this claim because either
22 the policies are lawful as to all SGs or they are unlawful as to all SGs. Variations in the damages
23 that the SGs have suffered, if any, can be addressed through a claims process or accounting and
24 do not preclude class certification.

25 Meal Period "On-Duty" Claims. The meal period "on-duty" claim is based on paragraph
26 11 of the applicable California Wage Order. The Wage Order states at paragraph 11, "An "on

1 duty" meal period shall be permitted only when the nature of the work prevents an employee
2 from being relieved of all duty and when by written agreement between the parties an on-the-job
3 paid meal period is agreed to." Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶11(A). Plaintiffs assert
4 that the written agreements between ABC and the SGs are invalid because the nature of the work
5 does not prevent an employee from being relieved of all duty. (Charleton Dec., Exh H – Meal;
6 Period Waiver.) There is "absolute commonality" in this claim because either the nature of
7 security guard work where a SG is the only person assigned to a location prevents a SG from
8 being relieved of all duty for a meal period or it does not. After this common factual and legal
9 issue is resolved, the result can be applied to all SGs who worked as the only person assigned to
10 a location.

11 Meal Period Claims – Underlying law. The meal period claims are based on Labor Code
12 512 and paragraph 11 of the applicable California Wage Order. Labor Code 512 states, "An
13 employer may not employ an employee for a work period of more than five hours per day
14 without providing the employee with a meal period of not less than 30 minutes" The
15 applicable California Wage Orders state at paragraph 11, "No employer shall employ any person
16 for a work period of more than five (5) hours without a meal period of not less than 30 minutes."
17 Wage Orders Nos. 7-80, 7-98, 7-2001 at ¶11(A).

18 Labor Code 512 is ambiguous as to whether an employer's obligation to "provide" a meal
19 period requires the employer to make a meal period of 30 minutes available or to ensure that a
20 meal period of 30 minutes is taken. Labor Code 226.7 is similarly ambiguous. The Wage Orders
21 indicate that every person who works for more than five hours must be offered and must take a
22 meal period of not less than 30 minutes. Paragraph 11 of the Wage Orders state "No employer
23 shall employ any person for a work period of more than five (5) hours without a meal period of
24 not less than 30 minutes ..." "No employer shall employ" is mandatory and directive language.
25 The remainder of the sentence does not include the "authorize and permit" language, and avoids
26 the ambiguous term "provide." A review of the Wage Orders as a whole supports the same

1 conclusion. Employers are to provide meal periods of not less than 30 minutes, the time spent
2 on meal periods is not "hours worked," and "hours worked" is any time in which an employee is
3 "suffered or permitted to work, whether required to do so or not," Paragraph 2(G). In addition,
4 employers must maintain time records of when meal periods begin and end, Paragraph 7(A)(3),
5 so employers should know if employees are taking their assigned meal periods. Reading these
6 sections as a whole suggests that an employer must not knowingly suffer or permit an employee
7 to work during an assigned meal period. The Court has been unable to locate any case law
8 directly applicable to determining the elements of a meal period claim. *California*
9 *Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal. App. 3d 95, 114-115, states that
10 the general experience of mankind is that it takes 30 minutes to eat a meal, but does not address
11 whether the Wage Orders permit employees to elect voluntarily to eat quickly and return to work
12 in fewer than 30 minutes. The Court concludes that the Labor Code and the Wage Orders require
13 employers to ensure that employees take meal periods of not less than 30 minutes.

14 Rest Break Claims – Underlying law. The rest break claims are based on paragraph 12 of
15 the applicable California Wage Orders, which state, "Every employer shall authorize and permit
16 all employees to take rest breaks ..." The rest breaks are to be "at the rate of 10 minutes net rest
17 time per four (4) hours or major fraction thereof." Regarding pay, "Authorized rest period time
18 shall be counted as hours worked for which there shall be no deduction from wages." Wage
19 Orders Nos. 7-80, 7-98, 7-2001 at ¶12(A). There is no clear statutory or case law guidance on
20 what elements an employee must prove to establish a violation of the rest break provisions.

21 The Wage Order requires employers to make rest breaks available to employees, but does
22 not require employers to ensure that the employees take the full time allotted for those breaks.
23 The critical phrase in the Wage Order is "authorize and permit." It is unclear whether this term
24 means "require" or "allow." When used by the Legislature in other contexts, the phrase
25 "authorize or permit" appears to be synonymous with "allow." In several statutes the phrase
26 "authorize or permit" could be replaced with "allow" without altering the apparent meaning of

1 the statute, whereas replacement of “authorize or permit” with “require” would lead to strained or
2 nonsensical language. See, e.g., Business and Professions Code 20999(c); Cal. Ed Code 1270.1;
3 Cal Gov Code § 6546.1; Cal. Health and Safety Code 1371.3; Unemployment Insurance Code
4 1095(t). Case law addressing other issues suggests a similar interpretation of “authorize and
5 permit.” *Haggis v. City of Los Angeles* (2000) 22 Cal. 4th 490, 498 (equating the phrase
6 “authorize and permit” with matters that are discretionary or permissive and placing them in
7 contrast to matters that are obligatory or required). Case law does not clarify whether rest breaks
8 must be allowed or required. There is a public policy that employees must have the option of
9 taking rest breaks to rest, go to the toilet, and similar matters. *California Manufacturers Assn. v.*
10 *Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 115. It is less clear whether public policy
11 would require employees to take their breaks. Finally, the Court has considered the practicalities
12 of the workplace. Employers generally determine when any given employee gets to take his or
13 her break. In legal terms, rest periods are paid time that counts as “hours worked” and “hours
14 worked” is defined as when an employee is subject to the control of an employer. *Morillion v.*
15 *Royal Packing* (2000) 22 Cal.4th 575, 578. Therefore, a rest period can be viewed as an
16 assignment from the employer that an employee accepts just as the employee would accept an
17 assignment to stock shelves or work a cashier. The Wage Order requires employers to assign
18 employees to rest breaks, and that if an employee completes the assignment to his or her
19 satisfaction in less than 10 minutes then the employee can voluntarily elect to move on to other
20 assignments. The Court concludes that employers must allow their employees to take net 10
21 minute rest breaks, but employers are not liable if their employees voluntarily elect not to take all
22 the allotted rest time.

23
24 Rest Break and Meal Period Claims – Commonality. Plaintiffs have demonstrated that
25 common issues will predominate on the rest break and meal period claims for monetary relief.
26 There will be common issues of fact whether ABC’s staffing practices deprived SGs of meal

1 periods and the opportunity to take rest breaks. There is evidence that the many SGs worked at
2 locations where they were the only SG. (Rukin Dec. Exh C, Thrower Depo at 210-211; Index of
3 Class Member Declarations.) There is evidence that ABC required SGs to be at their post at all
4 times. (Charleton Dec., Exh H.) Therefore, there will be common issues whether SGs were
5 authorized or permitted to take the rest breaks permitted by the Wage Order. Likewise, there will
6 be common issues whether SGs were provided meal periods as required by Labor Code 512, but
7 the merit of the meal period claims is dependent on the validity of the "on duty" meal period
8 agreements.

10 Plaintiffs have demonstrated that common issues will predominate on the rest break and
11 meal period claims for injunctive relief. There is evidence that many SGs work alone. There are
12 common issues about whether ABC's staffing and other practices are lawful in light of the
13 requirement that SG's must be provided meal periods (unless waived by agreement) and must be
14 given the opportunity to take rest breaks.

16 Overtime on swapped shifts. Plaintiffs have not demonstrated that common issues will
17 predominate at trial concerning whether ABC unlawfully fails to pay overtime when SGs swap
18 shifts. There is no evidence that ABC has a policy of not paying overtime when a guard works
19 more than 8 hours in a day or 40 hours in a week due to a swapped shift. The record does not
20 contain evidence that ABC has an express policy of not paying overtime when a guard works
21 more than 8 hours in a day or 40 hours in a week due to a swapped shift. The record likewise
22 does not contain evidence that ABC's policies on overtime were implemented or ignored with
23 the result that there was widespread de facto policy or practice of failing to pay overtime on
24 swapped shifts. There is no basis for the Court to conclude that ABC's asserted failures to pay
25 overtime to one of the named plaintiffs were anything more than a few isolated incidents. *Int'l*
26 *Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 336 (defining "pattern or practice").

1 Wage Statements. Common issues will predominate at trial concerning whether ABC
2 unlawfully fails to provide accurate wage statements. The wage statement claims are in large
3 measure derivative of the other claims.

4
5 TYPICALITY AND ADQUACY OF REPRESENTATION.

6 Jones-Joseph and Torres are typical of the classes they seek to represent. Jones-Joseph
7 was primarily a dispatcher as opposed to a SG, but did work as a SG for some time. (Jones-
8 Joseph at 23-26 and 29.) Jones Joseph can, therefore, assert claims of SGs. The Court also
9 notes that the fact that Jones-Joseph was primarily a dispatcher as opposed to a SG affects only
10 her typicality to assert the meal period and rest break claims. The experiences and claims of
11 Jones Joseph and Torres appear to be reasonably typical of the experiences and claims of the
12 putative class as a whole.

13 Plaintiffs have demonstrated that they will adequately represent the class. They have no
14 conflicts with the class.

15 Plaintiffs have retained competent class counsel. The evidence that one member of one
16 of the firms representing Plaintiffs was the subject of bar discipline does not render his law firm
17 inadequate and is no reflection on the other law firm. The Court also notes that the Bar can
18 impose a range of discipline from private admonition to public admonition to suspension to
19 disbarment. By imposing discipline less than suspension or disbarment the Bar suggested that
20 the attorney can represent clients adequately.

21 ABC has presented the declarations of Tselentis, Minor, Polk, and Reyes, each of which
22 state that counsel for Plaintiffs sent correspondence to the declarants and asked the declarants to
23 sign declarations. The declarations reveal that counsel for Plaintiffs solicited information from
24 witnesses (permitted), requested the witnesses to sign declarations (permitted), and that the
25 declarants refused to sign the draft declarations (permitted). Absent evidence of
26

1 misrepresentation or coercion, the Court will not find that the efforts of counsel to gather
2 information from witnesses is improper.

3 There are individualized factors concerning Jones-Joseph (fired) and Torres (revoked his
4 on-duty meal agreement). To the extent relevant to the merits of this case, these individualized
5 issues are factually disputed and the Court will not presume that ABC's version is correct at this
6 stage in the proceedings. The individualized issues do not subject Jones-Joseph and Torres to
7 individualized defenses on the merits that will interfere with their ability to represent the class.

8
9 POLICY CONSIDERATIONS.

10 ABC argues that class certification is not appropriate because the claims are weak. The
11 Court does not consider the merits of a case on class certification. *Linder v. Thrifty Oil Co.*
12 (2000) 23 Cal.4th 429, 439-440 (determination of whether a class should be certified is a
13 procedural question and does *not* include a weighing of whether the action is legally or factually
14 meritorious).

15 ABC argues that class certification is not appropriate because the money at issue for each
16 class member is minimal and the cost of administration will outweigh any benefits to the
17 members of the class. There is some support for this argument. *Blue Chip Stamps v. Superior*
18 *Court of Los Angeles County* (1976) 18 Cal. 3d 381, 386; *Reyes v. Board of Supervisors* (1987)
19 196 Cal. App. 3d 1263, 1274-1275; *Devidian v. Automotive Service Dealers Assn.* (1973) 35 Cal.
20 App. 3d 978. Class actions do, however, serve their purposes even if they cannot provide
21 compensation to individual class members. Where the cost of claims administration outweighs
22 the benefits to be provided, the Court can use a cy pres distribution. C.C.P. 384(b); *In re*
23 *Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706. In addition, even if an administrative
24 process is inefficient or a cy pres distribution is inexact, a monetary recovery serves the purpose
25 of deterring unlawful business practices.

1 There is a relatively simple administrative procedure for handling individual Labor Code
2 claims. Labor Code 98. The administrative process is presumptively adequate for most claims.
3 In this case, however, the claims are so small that it is unlikely that even a few employees would
4 use a simple administrative process.

5
6 CONCLUSION.

7 Class certification is GRANTED to the extent that Plaintiffs seek monetary relief on the
8 guard card, meal period "on duty," meal period, rest break, and wage statement claims. The class
9 definition for those claims is: "All persons employed by ABC Security Service, Inc. in any non-
10 exempt security guard or security officer positions in the State of California at any time from
11 June 2, 2000, through [DATE]." The ending date will be the date the mailing list is fixed for
12 purpose of class notice. See *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812
13 (membership in class dependent on notice and an opportunity to opt-out). The class duration is
14 set by the four year statute of limitations for the UCL claim. The Labor Code and other claims
15 might have shorter limitations periods.

16 Class certification is GRANTED to the extent that Plaintiffs seek monetary relief on the
17 uniform claims (claim that ABC failed to pay interests on the uniform deposits and failed to
18 reimburse cleaning costs at the termination of employment). The class definition is: "All
19 persons who were employed by ABC Security Service, Inc. in any non-exempt security guard or
20 security officer positions in the State of California who terminated from ABC's employ at any
21 time from June 2, 2000, through [DATE]." The ending date will be the date the mailing list is
22 fixed for purpose of class notice.

23 Class certification is GRANTED to the extent that Plaintiffs seek injunctive relief on the
24 uniform, guard card, meal period "on duty," meal period, and rest break claims. The class
25 definition is: "All persons employed by ABC Security Service, Inc. in any non-exempt security
26

1 guard or security officer positions in the State of California at any time from June 2, 2000,
2 through the date of judgment.

3 Class certification is DENIED to the extent that Plaintiffs seek monetary or injunctive
4 relief on the overtime on swapped shifts claims.

5 This order on class certification is not an indication of the merit of any of the claims.

6
7 EVIDENCE

8 The Court has considered all the declarations submitted, as well as the exhibits attached
9 thereto. The Court's consideration of the evidence is limited to the motion for class certification
10 and should not be construed as an indication of admissibility in future motions or at trial.

11
12 FURTHER PROCEEDINGS.

13 The Court sets the next case management conference for January 24, 2007, at 10:00 am.

14 At the case management conference the parties should be prepared to discuss the
15 necessity of providing class notice, the mechanics and form of any such notice, and whether a
16 formal motion on class notice will be required. C.R.C. 1856. To the extent that Plaintiffs seek
17 monetary relief, the Court is inclined to order notice and provide absent class members an
18 opportunity to opt out. *Bell v. American Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1609. To
19 the extent that Plaintiffs seek injunctive relief, the Court is inclined to order that it is not
20 necessary to provide class members with notice and an opportunity to opt out of the class.
21 C.R.C. 1856(b)(1) and (2) and (c)(1) and (2). See also *Frazier v. City of Richmond* (1986) 184
22 Cal. App. 3d 1491, 1500-1501.

23 ///

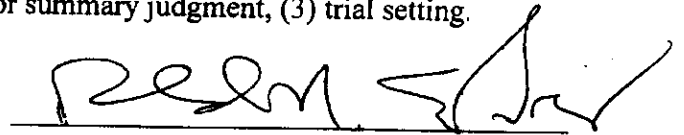
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1 At that time, counsel should also be prepared to discuss (1) what discovery is necessary
2 before trial, (2) motions for summary adjudication or summary judgment, (3) trial setting.

3
4 Dated: December 12, 2006


Judge Ronald M. Sabraw

Case Title/No.: **TORRES VS. ABC SECURITY SERVICE, INC.**
RG04158744

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the Alameda County Superior Court and not a party to this cause. I served this ORDER GRANTING IN PART AND DENYING IN PART THE MOTION OF PLAINTIFFS FOR CLASS CERTIFICATION by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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Dated: December 12, 2006

Executive Officer/Clerk of the Superior Court

By


Elizabeth Opelski-Erickson, Deputy Clerk